EDITOR'S NOTE

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. 85-993-ASX
atus: GRANTED

cketed:
cember 9, 1985

Title: Paula A. Hobbie, Appellant
v.
Unemployment Appeals Commission of Florida and
Lawton & Company

Court: District Court of Appeal of Florida,
Fifth District

Counsel for appellant: Carson,Walter E.

Counsel for appellee: Alley,John-Edward, Maher,John D.

try	Date	Note	Proceedings and Orders
1	Dec 9 1985	G	Statement as to jurisdiction filed.
2	Jan 22 1986		DISTRIBUTED. February 21, 1986
3	Feb 3 1986	P	Response requested. (Due March 5, 1986 - NONE RECEIVED)
4	Jan 31 1986		Record filed.
6	Mar 4 1986		Order extending time to file response to jurisdictional statement until March 20, 1986.
7	Mar 5 1986		Motion of appellee FL Unemployment Appeals Commn. to dismiss or affirm filed.
8	Mar 26 1986		REDISTRIBUTED. April 18, 1986
9	Apr 21 1986		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.
			**********
1	May 15 1986		Order extending time to file brief of appellant on the merits until July 5, 1986.
2	Jun 4 1986		Brief amicus curiae of Baptist Joint Committee, et al filed.
3	Jun 6 1986		Brief amicus curiae of Catholic League for Religious and Civil Rights filed.
4	Jun 25 1986		Record filed.
5	Jul 3 1986		Brief amicus curiae of Council on Religious Freedom filed.
6	Jul 3 1986		Joint appendix filed.
7	Jul 3 1986		Brief of appellant Paul A. Hobbie filed.
8	Jul 7 1986		Brief amicus curiae of Rutherford Institute, et al. filed.
9	Jul 3 1986		Brief amicus curiae of American Jewish Congress filed.
1	Jul 23 1986		Order extending time to file brief of appellee on the merits until September 5, 1986.
2	Aug 26 1986		Brief of appellee Lawton and Company filed.
3	Sep 5 1986		Brief amicus curiae of United States filed.
4	Sep 12 1986		CIRCULATED.
5	Oct 6 1986		SET FOR ARGUMENT. Wednesday, December 10, 1986. (2nd case) (1 hour).
6	Nov 26 1986	X	Reply brief of appellant Paul A. Hobbie filed.
7	Dec 10 1986		ARGUED.

85-993

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAULA A. HOBBIE,

Appellant,

v.

UNEMPLOYMENT APPEALS COMMISSION AND LAWTON AND COMPANY,

Appellees.

On Appeal From The District Court Of Appeal Of The State Of Florida, Fifth District

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether an employee's refusal for religious reasons to work on her Sabbath constitutes "misconduct connected with work" so as to warrant denial of unemployment compensation benefits to that person when she is discharged.

2. Whether Section 443.101, Florida Statutes, violates the Free Exercise Clause of the First Amendment when applied in such a manner as to deny unemployment compensation benefits to a person who refuses to work scheduled hours because of sincerely held religious convictions which were adopted after employment began.

LIST OF ALL PARTIES

All of the parties appearing in the Florida appellate court are listed in the caption of this Jurisdictional Statement.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-___

PAULA A. HOBBIE,

Appellant,

v.

UNEMPLOYMENT APPEALS COMMISSION, et al,

Appellees.

On Appeal From The District Court
Of Appeal Of The State Of Florida, Fifth District

JURISDICTIONAL STATEMENT

OPINIONS BELOW

Hobbie was fired when she refused to work on her Sabbath. She applied for unemployment compensation benefits but was denied. On appeal her claim was heard by an Appeals Referee who issued a Decision dated July 20, 1984, affirming the initial denial of such benefits. (A copy of that Decision is attached hereto as "Appendix A.") The referee's determination was, in turn, affirmed by the Florida Unemployment Appeals Commission on September 11, 1984, with a single sentence: "Upon review pursant to

Section 443.151(4)(c), Florida Statutes, it is found that the decision of the appeals referee is in accord with the essential requirements of law and is, therefore, affirmed." (A copy of that Order is attached hereto as "Appendix B.") Hobbie appealed the Commission's Order to the District Court of Appeal of the State of Florida, Fifth District. On September 10, 1985, that court issued its decision: "*Per Curiam*. Affirmed." (A copy of that Decision is attached hereto as "Appendix C".)

On October 2, 1984, a "Notice of Appeal" was filed with the District Court of Appeal (A copy of that Notice is attached hereto as "Appendix D.")

JURISDICTION

This is an appeal from a final judgment of the District Court of Appeal of the State of Florida, Fifth District.[1]. The judgment confirmed an interpretation of Florida law so as to deny Hobbie rights secured by the Free Exercise Clause of the First Amendment. The Unemployment Appeals Commission determined that the refusal to work on her Sabbath constituted "misconduct connected with work" under Section 443.101(1)(a), Florida Statutes. As a consequence, she was denied unemployment compensation benefits. Hobbie has challenged this interpretation of the Florida statute and argued its repugnance to both the Federal Constitution and the decisions of the United States Supreme Court.

This Court has jurisdiction on appeal by virtue of 28 U.S.C.A. § 1257(2). This appeal has been docketed in this Court within 90 days of the final judgment.

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[1] Under Florida law a *per curium* decision cannot be appealed to the Florida Supreme Court. See Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure. *In Re Florida Rules of Appellate Procedure*, 391 So.2d 203 (Fla. 1980).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provision involved is found within the Religion Clauses of the First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .

The pertinent portion of Florida statutes are as follows:

> Section 443.101, Florida Statutes: An individual shall be disqualified for benefits: (1)(a) For the week in which he has voluntarily left his employment without good cause attributable to his employer or in which he has been *discharged* by his employing unit *for misconduct connected with his work*, if so found by the division. [Emphasis added.]
>
> Section 443.036(24) Florida Statutes: "Misconduct" includes, but is not limited to, the following which shall not be construed in *pari materia* with each other:
>
> (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or
>
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent or evil design, or to allow an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

STATEMENT OF THE CASE

Hobbie had been employed by Lawton and Co., a Florida jeweler, for some two and one-half years until her discharge on June 1, 1984. Her initial employment was as

a manager trainee but shortly before her termination, Hobbie had been promoted to an assistant manager position.

When Hobbie began her employment she was not a member of the Seventh-day Adventist Church. However, in May of 1984, Hobbie became a baptized member of that church. The teachings of this religious organization forbids its members from secular activities during the period between sundown Friday and sundown Saturday. In April of that year she advised her immediate superior, Parks L. Heaton, of her new Sabbath beliefs, indicating that she could no longer work during that period of time.

Heaton worked out an arrangement with Hobbie where she agreed to cover for him on Sundays and he agreed to work for her whenever she was scheduled to work on Friday nights after sunset or before sunset on Saturdays. This arrangement, made without the prior approval of Lawton and Company's upper management, proved successful for approximately two months. Then upper management learned of this arrangement and ordered its immediate discontinuance. At that time, Hobbie was given an ultimatum of either working on her Sabbaths as scheduled, or quitting. The employer made no attempt to accommodate Hobbie's beliefs, despite her immediate manager's statement that their arrangement was working without any problem. She refused to quit or to work on her Sabbath.

On June 1, 1984, Lawton and Company discharged Hobbie for misconduct connected with work. On June 4, she filed a claim with the Florida Department of Labor and Employment Security for unemployment compensation benefits. Lawton and Company contested the payment of such benefits to Hobbie because she had been:

"Discharged for *misconduct* connected with work on June 1, 1984." Specifically, the employer stated that she had been discharged because: "The claimant was not able to work hours needed as she had done for the past 2 years. Due to claimant's recent change in beliefs the claimant made herself unavailable for work on Friday and Saturday. The claimant was given the chance to work her normal hours as she had done for the previous 2-2½ years or terminate her employment."

On June 17 the Florida Department of Labor and Employment Security-Bureau of Unemployment Compensation denied Hobbie's application for benefits. On June 22 she appealed this determination. The matter was heard by an Appeals Referee on July 20. The sincerity of Hobbies religious beliefs was never questioned. Neither did the employer offer any evidence suggesting that it had suffered injury, damage or other hardship as a result of Hobbies request for a religious accommodation. Nor did the testimony reflect any attempt by Lawton and Company—other than what Hobbie and her immediate supervisor had worked out among themselves—to effect an accommodation of her beliefs. The Appeals Referee denied Hobbie benefits, concluding that she had been discharged for "misconduct connected with work."

THE QUESTION IS SUBSTANTIAL

The decision contends that under state law Hobbie may not receive unemployment compensation benefits if after beginning employment she adopts new religious beliefs that conflicted with the requirements of her job. While this precise issue was not addressed in either *Sherbert* v. *Verner*, 374 U.S. 398 (1963) or *Thomas* v. *Review Bd. of Indiana Employment Sec.*, 450 U.S. 707 (1981), it is clearly inconsistent with the spirit of these decisions.

Such a construction effectively limits First Amendment protections to those who adhere to religious beliefs but deny individuals the right to adopt new beliefs or convert from one faith to another.

The importance of this case is considerable. Most states and the District of Columbia—like Florida—have statutes which contain the phrase "misconduct connected with his work," or comparable language.[2] Addtionally, several

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[2] Ala. Code § 25-4-78 (1975); Alaska Stat. § 23.20.379 (1962); Ariz. Rev. Stat. Ann. § 23-775 (1956); Ark. Stat. Ann. § 81-1106 (1947); Cal. Unemp. Ins. Code § 1256 (West 1953); Colo. Rev. Stat. § 8-73-108 (1973); Conn. Gen. Stat. Ann. § 31-236 (West 1958); Del. Code Ann. tit. 19 § 3315 (1974); D.C. Code Ann. § 46-310 (1973); Ga. Code Ann. § 54-610 (1933); Hawaii Rev. Stat. § 383-30 (1976); Idaho Code § 72-1366 (1947); Ill. Ann. Stat. ch. 48, § 432 A (Smith-Hurd 1935); Ind. Code Ann. § 22-4-15-1 (Burns 1971); Iowa Code Ann. § 96.5.2 (West 1949); Kan. Stat. Ann. § 44.706 (1964); Ky. Rev. Stat. Ann. § 341.370 (Bobbs-Merrill 1970); La. Rev. Stat. Ann. § 23:1601 (West 1950); Me. Rev. Stat. Ann. tit. 26, § 1193 (1964); Md. Ann. Code art. 95A, § 6 (1957); Mass. Gen. Laws Ann. ch. 151A, § 25 (West 1958); Mich. Comp. Laws Ann. § 421.29 (West 1948); Minn. Stat. Ann. § 268.09 (West 1946); Miss. Code Ann. § 71-5-513 (1972); Mo. Ann. Stat. § 288.050 (Vernon 1949); Mont. Code Ann. § 87-106 (1947); Neb. Rev. Stat. § 48-628 (1943); Nev. Rev. Stat. § 612.385 (1957); N.H. Rev. Stat. Ann. § 282-A:32 (1977); N.J. Stat. Ann. § 43:21-5 (West 1939); N.M. Stat. Ann. § 51-1-7 (1978); N.Y. Lab. Law § 593 (Consol. 1939); N.C. Gen. Stat. § 96-14 (1965); N.D. Cent. Code § 52-06-02 (1959); Ohio Rev. Code Ann. § 4141.29 (Page 1953); Okla. Stat. Ann. tit. 40, § 2-406 (West 1971); Or. Rev. Stat. § 657.176 (1953); Pa. Stat. Ann. tit. 43, § 802 (Purdon 1970); R.I. Gen. Law § 28-44-18 (1956); S.C. Code Ann. § 41-35-120 (Law. Co-op 1976); S.D. Codified Laws Ann. § 61-6-14 (1967); Tenn. Code Ann. § 50-7-303 (1956); Tex. Rev. Civ. Stat. Ann. art. 5221b-3 (Vernon 1958); Utah Code Ann. § 35-4-5 (1953); Vt. Stat. Ann. tit. 21, § 1344 (1958); Va. Code § 60.1-58 (1950); Wash. Rev. Code Ann. § 50.20.060 (1961); W.Va. Code Ann. § 21A-6-3 (West 1966); Wis. Stat. Ann. § 108.04 (West 1957); Wyo. Stat. Ann. § 27-3-311 (West 1977).

state appellate courts have ruled on this issue with conflicting or inconsistent results. See *Key State Bank* v. *Adams*, 360 N.W.2d 909 (Mich. Ct. App. 1984); *Hildebrand* v. *Unemployment Ins. Appeals Bd.*, 140 Cal. Rptr. 151, 566 P.2d 1297 (1977) *cert. denied*, 434 U.S. 1068 (1978); *DePriest* v. *Bible*, 653 S.W.2d 721 (Tenn. App. 1980); *DePriest* v. *Puett*, 669 S.W.2d 669 (Tenn. App. 1984); *Engraff* v. *Industrial Comm'n*, 678 P.2d 564 (Colo. Ct. App. 1983); *Levold* v. *Employment Sec. Dept.*, 604 P.2d 175 (Wash. App. 1979); *Martinez* v. *Industrial Comm'n of Colorado*, 618 P.2d 738 (Colo. Ct. App. 1980).

The Unemployment Appeals Commission, applying state law, concluded that Hobbie had been discharged "for misconduct connected with her work." Consequently, she was not entitled to receive unemployment compensation benefits. The decision ignored statements on the record that Hobbie's religious beliefs could have been accommodated without hardship on the employer.

The state, seeking to distinguish this case from *Sherbert* and *Thomas*, contend that by accepting a new religion, Hobbie was the "agent of change" and not the employer. While the "agent of change" argument was not specifically addressed in either *Sherbert* or *Thomas* those decisions provide principles which require rejection of the state's position.

In *Sherbert*, a member of the Seventh-day Adventist Church was discharged by her South Carolina employer because she would not work on the Sabbath of her faith. She filed a claim for unemployment compensation which was denied because of her refusal to accept any jobs that would involve work on her Sabbath. Under state law she was disqualified for benefits because of her failure, without good cause, to accept "suitable work when offered . . .

by the employment office or the employer . . ." Sherbert challenged this decision claiming the state statute abridged her right to the free exercise of her religion under the Free Exercise Clause of the First Amendment.

The Supreme Court concluded that the South Carolina law did impose a burden on the free exercise of religion. It observed: "If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that is constitutionally invalid even though the burden may be characterized as being only indirect. *Braunfeld* v. *Brown*, 366 U.S. 599 at 607" 374 U.S. at 404. Sherbert's ineligibility for benefits was solely because of her religious practices. The law had forced her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand.

An infringement by the state of constitutional rights or incidental burden, can only be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . ." *NAACP* v. *Button*, 371 U.S. 415 (1963). The Supreme Court was unable to find a compelling state interest:

> We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of Appellant's First amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945). No such abuse or danger has been advanced in the present case.

Id. 374 U.S. at 406 and 407.

South Carolina could *not* constitutionally apply the eligibility provisions of its unemployment compensation law in such a manner as to force a worker to abandon her religious convictions respecting a day of rest. Relying on *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1947), it observed that no state may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[Emphasis added]

The matter on appeal effectively reverses the Supreme Court's landmark decision in *Sherbert*. It permits the state to accomplish what South Carolina failed to do in *Sherbert*, namely, to deny unemployment compensation benefits to an individual because of her religious practices. Florida law denies benefits to Hobbie because she was discharged for "misconduct connected with work" rather than "failure to accept work." Such an argument is contrary to both the spirit and intent of *Sherbert*.

In *Thomas*, the Supreme Court had another opportunity to review the principles first articulated in *Sherbert*. At issue was the denial of unemployment compensation benefits to a Jehovah's Witness who quit his job because religious beliefs forbade participation in the production of armaments. Thomas argued a violation of his First Amendment right to the free exercise of religion.

Thomas was transferred by his employer to a job which produced turrets for military tanks. He claimed his religous beliefs prevented him from participating in the production of war materials. When he quit the State of

Indiana refused to pay him unemployment compensation benefits. It determined he was ineligible under state law because he had *voluntarily* left employment for personal reasons and without good cause.

Concluding that Thomas had terminated his employment for personal religious reasons, the Court looked first to *Everson* v. *Board of Education*, 330 U.S. 1 (1947) and observed that a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program. Nor may a state exclude persons because of their faith or lack of it "from receiving the benefits of public welfare legislation." 330 U.S. at 16.

Then turning to *Sherbert:*

> The ruling [disqualifying Mrs. Sherbert from benefits because of her refusal to work on Saturday in violation of her faith] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship." 374 U.S. at 404.

Indiana had argued that the burden upon religion under state law was only indirect. The state required an applicant for unemployment compensation to show only that they left work for "good cause in connection with the work."

However, the Court rejected this argument. It observed: "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. 205

at 220 (1972) cf. *Walz* v. *Tax Comm'n.*, 397 U.S. 664 (1970).

Finding similarities between *Sherbert*, the decision found that Thomas "was put to a choice between fidelity to religious beliefs or cessation of work; the coercive impact on Thomas is indistinguishable from Sherbert . . ." 450 U.S. at 717.

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherant to modify his behavior and to violate his beliefs, a burden upon religion exists. *While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.* [Emphasis added]

Id. 450 U.S. at 717, 718.

The Court also rejected Indiana's attempts to distinguish *Sherbert* in that she had been dismissed by the employer's action rather than quitting as had Thomas. Whether Thomas had voluntarily quit or whether he had been fired for refusing to do the work would not change the end result. "In both cases, the termination flowed from the fact that the employment, once acceptable, became religiously objectionable because of changed conditions." 450 U.S. at 718. The Court found no compelling state interest to justify such an inroad on Thomas' religious liberty.

In the instant proceeding Hobbie was denied unemployment compensation benefits because of "misconduct associated with her work." Florida maintains that her act of adopting new religion at variance with her work conditions constituted misconduct and removed her from the protection afforded by both *Sherbert* and *Thomas*. Such a

position both ignores and demeans the spirit of these decisions.

In *Sherbert*, the Court was asked to deny unemployment compensation benefits to an individual who in violation of state law refused "to accept available suitable work when offered" because in conflict with her religious beliefs. The Court declined to do so. In *Thomas*, the ever ingenious state asked the Court to deny unemployment compensation benefits to an individual who quit his job rather than violate his religious beliefs. The state contended that he had "voluntarily" left his employment for personal reasons and thus did not qualify for benefits. This Court rejected that argument as well. Now in *Hobbie*, Florida contends that since Hobbie was "the agent of change" in that she adopted a new religion, her termination was for "misconduct connected with work." As such, she is not entitled to unemployment compensation benefits. This contention must be rejected as well representing yet one more attempt to reverse *Sherbert*.

The principles of *Sherbert* control this matter. One cannot argue that if Sherbert had been denied benefits under the "misconduct connected with work" provision of state law that she would have lost her case before this Court. Nor would the results of that decision differ if she had "voluntarily" left her employment as was the case in *Thomas*. Neither should Florida be permitted to deny Hobbie unemployment compensation benefits for "misconduct connected with work" when she refused to work on her Sabbaths.

CONCLUSION

The questions presented in this appeal are substantial and of significant public importance. While the precise issue is of first impression, the principles articulated in

Sherbert and *Thomas* require this Court to summarily reverse the decision of the District Court of Appeal. Alternatively, probable jurisdiction should be noted and this matter be set down for appropriate briefing and oral argument on the constitutionality of the Florida statute as interpreted.

Respectfully submitted,

WALTER E. CARSON, ESQ.
MITCHELL A. TYNER, ESQ.
FRANK M. PALMOUR, ESQ.
Attorneys for the Appellant

December 1985

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Jurisdictional Statement were mailed, U.S. postage prepaid, to Richard S. Cortese and Geri Atkinson-Hazelton, General Counsel, Unemployment Appeals Commission, Suite 221, Ashley Building, 1321 Executive Center Drive, East, Tallahassee, Florida 32301, attorneys for Appellee Unemployment Appeals Commission; and to Joseph W. Carvin, Alley and Alley, Chartered, P.O. Box 1427, Tampa, Florida 33601, and John Sanders, P.O. Box 340, Winter Park, Fla. 32790 attorneys for Appellee Lawton and Company, this 9th day of December, 1985.

WALTER E. CARSON, ESQ.

APPENDIX

APPENDIX A

Referee's Decision:
Docket No. 84-14918U

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY
UNEMPLOYMENT COMPENSATION APPEALS BUREAU

NOTICE OF DECISION OF APPEALS REFEREE

Claimant: APPELLANT
S.S. No.: 100-36-7461

Paula A. Hobbie
c/o 2360 Virginia Drive
Altamonte Springs, FL 32714

Employer:
No.: -439856-A

Lawton and Co.
500 N. Orlando Avenue, Ste. 1264
Winter Park, FL 32789

Jurisdiction: 443.151(4)(a) & (b) F.S.

IMPORTANT

This decision will become final unless within (20) calendar days after the date it is mailed, you file an application for review to the Unemployment Appeals Commission, Room 221, Ashley Bldg., 1321 Executive Center Dr., East, Tallahassee, Florida 32301.

Other copies mailed to:

☒ UCCO	-3632-0
☐ MU*	☒ Emp.'s Rep.
☐ ASLO**	☒ Emp.'s Atty.
***	☒ Clt.'s Atty.

APPEARANCES

CLAIMANT: YES

EMPLOYER: YES

FINDINGS OF FACT

The claimant was employed from October 4, 1981 through June 1, 1984, by the employer, first as a trainee and then as an

assistant manager. In April, 1984, the claimant informed her manager that she was being baptised in the Seventh-Day Adventist Church and that she would no longer be able to work from sundown on Friday to sundown on Saturday, because that was considered their Sabbath. The store manager and the claimant worked out a compromise which allowed him to cover for the claimant on Friday nights and Saturday, in return for which she would work evenings and Sundays for the manager. The general manager's supervisor became aware of the situation and informed the general manager that no exceptions could be made to the standard scheduling policy for the company. The company does not allow any management personnel to take Friday nights or Saturdays off as a permanent day off, as these are traditionally their heaviest retail sales days. The claimant worked three of the six weeks between her compromise with the manager and May 28, 1984. On May 28, 1984, the claimant was informed that she could no longer work evenings and Sunday in return for being off on Friday evenings and Saturday. The manager advised the claimant to speak to the general manager, who, after conferring with the claimant and her minister, advised her that the company could not make any allowances to give the claimant special scheduling privileges. The claimant was told following a meeting on June 1, 1984, that she would either work the days she was scheduled to work or they would accept her resignation. The claimant refused to resign and on the evening of June 1, 1984, she was asked for her keys. The claimant had previously worked on Saturdays for over two years.

CONCLUSIONS OF LAW: The law provides that "misconduct connected with work" means an intentional act or course of conduct by the worker in violation of his duties and obligations to the employer.

The record and evidence in this case show that the claimant was discharged for refusing to work scheduled hours on Saturdays due to religious beliefs. The testimony presented at the hearing by the employer shows that the claimant had worked on Saturdays and Friday evenings for an extended period of time and that she had accepted that as a condition of hire. The testimony of the employer shows that the claimant was given

the opportunity to continue her employment by working her regularly scheduled hours. The testimony of the claimant has not established that the employer's requirements of her were unreasonable in the context of her position and prior employment. It has been held that the law cannot be readily construed to require an employer to discriminate against other employees in order to enable others to observe their Sabbath. In view of the testimony presented by the employer and the claimant, it must be held that the claimant was discharged from the job for misconduct connected with the work when she refused to work the hours scheduled for her. The employer's testimony has established that, although there was a temporary solution to the problem of covering for the claimant on Fridays and Saturdays, this solution could not be guaranteed as being of a permanent nature and that it would not interfere with the rights of the other employees in the store.

DECISION: The determination of the claims examiner dated June 19, 1984, is affirmed.

This is to certify that on this date, July 20, 1984, a copy of the above decision was mailed to the last-known address of each interested party.

By: /s/ Mary Dougherty
MARY DOUGHERTY
Deputy Clerk

/s/ J. D. Finkbohner
J. D. FINKBOHNER
Appeals Referee
Winter Park, Florida
July 20, 1984

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APPENDIX B

STATE OF FLORIDA
UNEMPLOYMENT APPEALS COMMISSION

U.A.C. Order No. 84-3061

IN THE MATTER OF:

PAULA A. HOBBIE
SS No. 100-36-7461
Claimant/Appellant

vs.

LAWTON AND COMPANY
Employer No. -439586A
Employer/Appellee

UCCO Orlando 3632-0-12117

ORDER OF UNEMPLOYMENT APPEALS COMMISSION

Upon review pursuant to Section 443.151(4)(c), Florida Statutes, it is found that the decision of the appeals referee is in accord with the essential requirements of law and is, therefore, affirmed.

It is so ordered.

UNEMPLOYMENT APPEALS COMMISSION

R. Carson Dyal, Chairman
Delois Baskin, Member
Charlie Harris, Member

This is to certify that on Sep. 11, 1984, the above Order was filed in the office of the Clerk of the Unemployment Appeals Commission, and a copy mailed to the last known address of each interested party.

By/s/DONNA JOHNSON
Deputy Clerk

APPENDIX C

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1985

Case No. 84-1491

PAULA A. HOBBIE,

Appellant,

v.

UNEMPLOYMENT APPEALS COMMISSION
AND LAWTON & COMPANY,

Appellees.

Decision filed September 10, 1985

Administrative Appeal from the Unemployment Appeals Commission.

Frank M. Palmour and Sharon Lee Stedman, of Rumberger, Kirk, Caldwell Cabaniss & Burke, Orlando, for Appellant.

Richard S. Cortese, Tallahassee, for Appelle Unemployment Appeals Commission.

John-Edward Alley and Joseph W. Carvin, of Alley and Alley, Chartered, Tampa, for Appellee Lawton and Company.

PER CURIAM.

AFFIRMED

COBB, C.J., UPCHURCH, F.J., and GOSHORN, G.S., Associate Judge, concur.

APPENDIX D

IN THE FIFTH DISTRICT COURT OF APPEAL
STATE FLORIDA

Case No. 84-14918U

PAULA HOBBIE

Appellant,

vs.

UNEMPLOYMENT APPEALS COMMISSION AND
LAWTON AND COMPANY,

Appellee.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that PAULA A. HOBBIE, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Fifth District Court of Appeals, State of Florida, affirming the ruling of the Unemployment Appeals Commission, entered on September 10, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/Frank M. Palmour
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Co-Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Joseph W. Carvin, Esquire, Alley and Alley, Chartered, Post Office Box 1427, Tampa, Florida, 33601, Counsel for Lawton and Company and Richard S. Cortez, Esquire, Ashley Building, Suite 221, 1321 Executive Center Drive East, Tallahassee, Florida, Counsel for Unemployment Appeals Commission.

/s/ Frank M. Palmour
FRANK M. PALMOUR

NO. 85-993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PAULA A. HOBBIE,
APPELLANT,
V.
UNEMPLOYMENT APPEALS COMMISSION
AND LAWTON AND COMPANY,
APPELLEES.

ON APPEAL FROM THE DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

MOTION TO DISMISS OR AFFIRM

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Attorney for Appellee
UNEMPLOYMENT APPEALS COMMISSION

NO. 85-993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

PAULA A. HOBBIE,
APPELLANT,

V.

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UNEMPLOYMENT APPEALS COMMISSION

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Constitutional and Statutory Provisions

Section 20.171(4), Florida Statutes (1983), provides:

> (a) There is created within the Department of Labor and Employment Security an Unemployment Appeals Commission, hereinafter referred to as the "commission." * * *
>
> * * *
>
> (c) The Commission is vested with all authority, powers, duties, and responsibilities relating to unemployment compensation appeal proceedings under Chapter 443.

Section 443.021, Florida Statutes (1983), provides:

> Declaration of public policy. --
>
> As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden

> which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with a nationwide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during the periods of employment from which benefits may be paid for periods of unemployment thus maintaining purchasing power and limiting the serious social consequences of unemployment. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, subject, however, to the specific provisions of this chapter. (emphasis added)

Section 443.101(1)(a)2., Florida Statutes (1983), provides:

> 2. Disqualification for being discharged for misconduct connected

with his work shall continue for the full period of unemployment next ensuing after having been discharged and until such individual has become reemployed and has earned wages not less than 17 times his weekly benefit amount and for not more than 52 weeks which immediately follow such week, as determined by the division in each case according to the circumstances in each case or the seriousness of the misconduct, pursuant to rules of the division enacted for determinations of disqualification for benefits for misconduct.

Section 443.101(2), Florida Statutes (1983), provides:

(2) If the division finds that the individual has failed without good cause either to apply for available suitable work when so directed by the division or employment office, or to accept suitable work when offered to him, or to return to his customary self-employment when so directed by the division, such disqualification shall continue for the week in which such failure occurred and for not more than 5 weeks immediately following such week, or a reduction by not more than 3 weeks from the duration of benefits, as determined by the division in each case. However, disqualification under this subsection shall continue for the full period of unemployment next ensuing after he has failed without good cause either to apply

for available suitable work, or to accept suitable work, or to return to his customary self-employment, pursuant to this subsection, and until such individual has become reemployed and has earned wages equal to or in excess of 17 times his weekly benefit amount. * * *

(a) In determining whether or not any work is suitable for an individual, the division shall consider the degree of risk involved to his health, safety, and morals; his physical fitness and prior training; his experience and prior earnings; his length of unemployment and prospects for securing local work in his customary occupation; and the distance of the available work from his residence.

* * *

Section 443.131(3)(a), Florida Statutes (1983), provides:

(3) CONTRIBUTION RATES BASED ON BENEFIT EXPERIENCE. --

(a) The regular and short-time compensation benefit payments made to any eligible individual shall be charged to the employment record of each employer who paid such individual wages equal to $100 or more within the base period of such individual in the proportion to which wages paid by each such employer to such individual within the base period bears to total wages paid by all such employers to such individual within the base

period. * * * Further, benefit payments will not be charged to the accounts of employers when such employers have furnished the division with such notices regarding separations of individuals from work and the refusal of individuals to accept offers of suitable work as are required by the provisions of this chapter and the rules of the division, if one or more of the following conditions are found to be applicable:

1. When an individual has left his job without good cause attributable to his employer or has been discharged by his employer for misconduct connected with his work, no benefits subsequently paid to him on the basis of wages paid to such individual by such employer prior to such separation shall be charged to such employer's account. (emphasis added).

STATEMENT OF THE CASE

The Unemployment Appeals Commission substantially accepts appellant Hobbie's statement of the case. The statement, however, is not complete. The Florida administrative hearing officer who conducted the evidentiary hearing below made the following additional findings.

(Jurisdictional Statement, Appendix A). Lawton and Company maintains a policy prohibiting management personnel from scheduling themselves to be off from work on Friday evenings and Saturdays on a regular basis. The rationale for the policy is that retail sales activity for the company is greatest at those times. Since Hobbie held the position of assistant manager, the policy applied to her. When Hobbie was baptized in the Seventh Day Adventist Church, she worked out a scheme with her supervisor, the store manager, to violate the policy. For three weeks she managed to be off from work on Friday nights and Saturdays. Subsequently, the general manager and his supervisor learned of the scheme and advised Hobbie and the store manager that the company allowed no exceptions to the policy. On June 1, 1984, Hobbie was advised that she must comply with the company policy or resign. Hobbie

refused to resign and the company demanded her keys to the store.

MOTION TO DISMISS

The appellant Hobbie seeks to invoke the Court's jurisdiction pursuant to 28 U.S.C. §1257(2). Jurisdiction is provided under that section to review a decision of the highest court of a state where the validity of a state statute is challenged as repugnant to the Constitution, treaties, or laws of the United States and the decision is in favor of its validity. The decision which the appellant asks the Court to review is a decision of the District Court of Appeal of the State of Florida, Fifth District. In its entirety, the decision states, "Per Curiam. Affirmed." Hobbie v. Unemployment Appeals Commission, 475 So.2d 711 (Table) (Fla. 5th DCA 1985).

A per curiam affirmance decision of a Florida district court of appeal without written opinion is not reviewable by the Supreme Court of Florida. Jenkins v. State 385 So.2d 1356 (Fla. 1980). The Unemployment Appeals Commission does not, therefore, contest that the decision below was rendered "by the highest court of a State in which a decision could be rendered." 28 U.S.C. 1257. See also Nash v. Florida Industrial Commission, 389 U.S. 235, 237 n.1 (1967).

It is not clear, however, that the federal question which the appellant seeks the Court to review was properly raised and passed on below. Under Florida law, a per curiam affirmance decision without written opinion has no precedential value. Department of Legal Affairs v. District Court of Appeal, Fifth District, 434 So.2d 310 (Fla. 1983). Such a decision does not necessarily adopt the decision being reviewed

because "[t]he rationale and basis for the decision without opinion is always subject to speculation." Id. at 312.

Thus, the decision which the appellant seeks the Court to review is the decision of the Unemployment Appeals Commission which adopted the decision of its unemployment compensation hearing officer.

The Unemployment Appeals Commission is the Florida administrative agency responsible for resolution of disputed unemployment compensation claims. §20.171(4)(a) & (c), Fla. Stat. (1983). Florida administrative agencies are vested with executive and delegated legislative powers. They do not possess judicial powers. They cannot, therefore, pass on the constitutionality of legislation. See, e.g., State Department of Administration, Division of Personnel v. State Department of Administration, Division of Administrative Hearings, 326 So.2d 187 (Fla. 1st DCA 1976); Pickerill

v. Schott, 55 So.2d 716 (Fla. 1951). See also Swan, Administrative Adjudication of Constitutional Questions: Confusion in Florida Law and a Dying Misconception in Federal Law, 33 U. Miami L. Rev. 527 (1979).

The Unemployment Appeals Commission does not possess the legal authority to rule on the federal question which the appellant seeks the Court to review. The Florida Fifth District Court of Appeal, which does possess such authority, expressed no opinion on the question.

The appellant has failed to demonstrate that the decision below expressly passed upon the federal question which the appellant asks the Court to review. The appellant has, therefore, failed to establish jurisdiction under 28 U.S.C. §1257(2). Nash v. Florida Industrial Commission, 389 U.S. 235, 237 n.1 (1967), suggests that the appellant might have been

able to invoke the Court's jurisdiction pursuant to 28 U.S.C. §1257(3), governing certiorari, and the Court may elect to proceed under that jurisdiction. 28 U.S.C. §2103. This appeal, however, must be dismissed.

MOTION TO AFFIRM

The Unemployment Appeals Commission agrees with Hobbie that the precise issue presented is one of first impression for the Court. The Unemployment Appeals Commission further agrees that the issue has been passed on by several state appellate courts with conflicting results. Compare Hildebrand v. Unemployment Ins. Appeals Bd., 140 Cal. Rptr. 151, 566 P.2d 1297 (1977), cert. denied, 434 U.S. 1068 (1978) (denying benefits); and Martinez v. Industrial Comm'n of Colorado, 618 P.2d 738 (Colo. Ct. App. 1980)(denying benefits); and Flynn v. Maine Employment Sec. Comm'n,

448 A.2d 905 (Me. 1982), cert. denied, 459 U.S. 1114 (1983)(denying benefits); and DePriest v. Puett, 669 S.W.2d 669 (Tenn. Ct. App. 1984)(denying benefits); and DePriest v. Bible, 653 S.W.2d 721 (Tenn. Ct. App. 1980)(denying benefits); and Levold v. Employment Sec. Dept., 604 P.2d 175 (Wash. Ct. App. 1979)(denying benefits) with Engraff v. Industrial Comm'n, 678 P.2d 564 (Colo. Ct. App. 1983)(allowing benefits); and Key State Bank v. Adams, 360 N.W.2d 909 (Mich. Ct. App. 1984)(allowing benefits). Since the question presented is one of first impression and the state court opinions on the issue are hopelessly in conflict, Hobbie's argument for summary reversal depriving the parties an opportunity to fully brief the merits of the issue is totally without merit.

If the Court declines to note probable jurisdiction, the decision below must be affirmed. There is simply no controlling

authority justifying reversal. Thomas v. Review Bd. of Indiana Employment Sec., 450 U.S. 707 (1981) and Sherbert v. Verner, 374 U.S. 398 (1963) are substantially different factually and conceptually from this case.

Sherbert held that state unemployment compensation officials cannot deny benefits to an applicant on the sole basis that the applicant refuses to seek or accept employment which would require the applicant to violate a religious conviction. Such action by a state was held violative of the free exercise clause of the First Amendment because it requires the applicant to choose between observance of religious convictions or forfeiture of unemployment compensation. South Carolina officials had construed its unemployment compensation statute so as to disqualify a Seventh Day Adventist who refused to accept employment which required her to work on her Sabbath. If Sherbert had arisen in Florida, it would have been

differently decided at the state level. Florida's unemployment compensation law permits claimants to refuse employment for compelling personal reasons, including moral reasons. §443.101(2), Fla. Stat. (1983). E.g. Yordamlis v. Florida Industrial Commission, 158 So.2d 791 (Fla. 3d DCA 1963)(benefits allowed to a claimant who refused offer of nighttime work because it conflicted with his familial responsibilities). The failure of the South Carolina law to recognize compelling personal reasons for refusing work presented the unemployed claimant in Sherbert the dilemma of choosing between her religious convictions or forfeiture of her unemployment benefits. That dilemma would have recurred each time the claimant became unemployed. No such dilemma is presented to Hobbie by Florida's unemployment compensation law. She is permitted to restrict her search for work to positions

compatible with her religious convictions provided her religion does not place so many restrictions on what work is acceptable that she is effectively removed from the labor market. Once she finds acceptable employment and earns seventeen times her weekly benefit amount, the penalty imposed in this case, she will be on an equal footing with all other workers. Moreover, if a future employer unilaterally changes the conditions of her employment so as to require Hobbie to violate her religion, she can quit without forfeiting her entitlement to unemployment compensation benefits. The Unemployment Appeals Commission has consistently held that an employer's substantial and unilateral change of a material condition of an employee's job constitutes good cause attributable to the employer for the employee to quit within the meaning of Section 443.101(1), Florida Statutes (1983). E.g., Vazquez v.

GFC Builders Corporation, 431 So.2d 739 (Fla. 4th DCA 1983). Unless the employee agrees to accept any schedule assigned by the employer, a worker who quits because of a unilateral change in schedule that works a substantial hardship on the employee would be entitled to benefits. See Beard v. State Department of Commerce, 369 So.2d 382 (Fla. 2d DCA 1979). Accordingly, if the Thomas case had arisen in Florida it too would have been decided in favor of the claimant.

In Thomas, the Court held that state unemployment compensation officials cannot deny benefits to an applicant because the applicant quit employment when his employer changed the conditions of his employment so as to require him to violate his religious convictions if he remained. Again, the Court held such state action to be violative of the applicant's First Amendment right to free exercise of religion.

This case presents the question whether an employee may change her religious convictions while already employed and force her employer to change the conditions of her employment to accommodate her new religious convictions. Hobbie's employer and the State of Florida concluded that she could not. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), instructs that Lawton and Company was correct. In that case, the Court refused to construe Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et. seq., as requiring an employer to discriminate against some employees in order to enable others to observe their Sabbath. Although Hobbie's employer was not legally obligated to provide her special treatment, Hobbie argues that Sherbert and Thomas dictate that the State of Florida provide such special treatment to her. Sherbert and Thomas hold that the states are restricted by the

free exercise clause from making demands on employees who become unemployment compensation claimants when those demands require the employee to violate religious convictions or forego valuable benefits. This case asks the Court to consider what demands an employee may make of her employer to accommodate religious convictions acquired after the employment commenced. This case also asks the Court to consider what special treatment a state must provide to a person who becomes unemployed because of her religious convictions then applies for government assistance.

Lawton and Company refused to discriminate against other employees in order to accommodate Hobbie's newly acquired religious convictions. The State of Florida refused to discriminate against other applicants for benefits by providing special treatment to Hobbie.

Florida's Unemployment Compensation Law, Chapter 443, Florida Statutes (1983), disqualifies claimants who voluntarily leave employment without good cause attributable to the employer, or who are discharged from employment for misconduct connected with work. §443.101(1), Fla. Stat. (1983). Disqualification of such workers is consistent with the declared public purpose of the program to provide benefits only to those persons unemployed through no fault of their own. §443.021, Fla. Stat. (1983). The word "fault" is used in the attributive sense and not the moral sense of the word. E.g., Slusher v. State Department of Commerce, 354 So.2d 450 (Fla. 1st DCA 1978)(benefits denied to a worker who quit employment to accompany her spouse who had relocated to another state).

Initially, Hobbie conspired with her supervisor to circumvent her employer's policy regarding scheduling of managerial

employees. When the conspiracy was discovered, she defied the employer's demand that she comply with the policy or resign. She refused to do either. Unquestionably, such actions would fall within the definition of misconduct as expressed in Florida's Unemployment Compensation Law. §443.036(24), Fla. Stat. (1983). Similarly, if she had resigned, she would have been subject to disqualification because her reason for quitting was not attributable to her employer.

Hobbie argues, however, that she is shielded from disqualification by the First Amendment. She asks the Court to compel the State of Florida to treat her differently because her defiance of her employer's directive was motivated by her religious convictions. Hobbie asks the Court to demand the State of Florida adopt a rule of law providing more favorable treatment of persons who become unemployed

for religious reasons than it provides for those who become unemployed for equally compelling secular reasons.

Such a rule of law would directly conflict with the establishment clause. In Estate of Thornton v. Caldor, ___ U.S. ___, 105 S.Ct. 2914 (1985), the Court held a Connecticut statute that required employers to observe the day of the week designated by each employee as his Sabbath was violative of the establishment clause. The Court stated that the statute:

> imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates.

Id. at 2917-18. In expressing the Court's opinion, Chief Justice Burger quoted Judge Learned Hand:

> "The First Amendment . . . gives no one the right to insist that in pursuant of their own interests

> others must conform their conduct to his own religious necessities." Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (CA2 1953).

Id. at 2918. The Court has stated that the establishment clause prohibits the states from passing laws "which aid one religion . . . [or] all religions." Everson v. Board of Education, 330 U.S. 1, 15 (1947). In Torcaso v. Watkins, 367 U.S. 488, 495 (1961), the Court stated that the government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers."

If the State of Florida were to amend its unemployment compensation statute to provide that behavior of an employee which would otherwise constitute misconduct is acceptable if motivated by religious convictions it would surely run afoul of the establishment clause. It would also require the state to inquire whether the claimant's beliefs are "religious" and if

they are sincerely held. Thomas, 450 U.S. at 726 (REHNQUIST, J., Dissenting). Such a situation would inevitably entangle the state in religious matters contrary to the First Amendment.

In both Sherbert and Thomas, the Court recognized the "tension" between the free exercise and establishment clauses. In both instances, the Court stated that the result reached was not violative of the establishment clause. Justice HARLAN dissenting in Sherbert and Justice REHNQUIST dissenting in Thomas protested that the Court simply refused to squarely address the issue in either case. The Unemployment Appeals Commission respectfully expresses agreement with the minority view in both cases. Neither Sherbert nor Thomas can be reconciled with the principles expressed in cases such as Anguilar v. Felton, ____ U.S. ____, 105 S.Ct. 3233 (1985):

> neither the State nor Federal Government shall promote or hinder a particular faith or faith generally through advancement of benefits or through excessive entanglement of church and state in the administration of those benefits.

Id. at 3239. In Estate of Thornton the Court condemned a state statute requiring employers to observe the Sabbath chosen by its employees. In Sherbert and Thomas the Court demanded that South Carolina and Indiana adopt rules of law having the same effect as the offending Connecticut statute. Sherbert and Thomas demand in the name of the free exercise clause what Estate of Thornton condemns in the name of the establishment clause.

Even if the establishment clause would permit special treatment of unemployment compensation claimants on religious grounds, the free exercise clause does not demand that the states provide such treatment. Sherbert, 374 U.S. at 423 (HARLAN,, J. dissenting) Thomas 450 U.S. at 723

(REHNQUIST, J. dissenting). Braunfeld v. Brown, 366 U.S. 599 (1961). Florida's unemployment compensation statute is a general law promoting a secular purpose. It did not penalize Hobbie because she became a Seventh Day Adventist. It penalized her because she refused to work her regularly assigned schedule and thereby caused her unemployment. Unquestionably Florida has a valid interest in promoting employment and discouraging voluntary unemployment. Hobbie, not her employer, changed the status quo when she adopted new religious convictions. Payment of benefits to Hobbie with resulting tax consequences to Lawton and Company, §443.131(3)(a), Fla. Stat. (1983), would effectively allow Hobbie to impose the requirements of her religion on another. This the First Amendment neither demands nor allows.

Conclusion

This case presents a question of first impression, similar to but not controlled by Sherbert and Thomas. In the absence of a controlling authority to the contrary, the decision below must be affirmed or probable jurisdiction noted.

Respectfully submitted,

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(904) 487-2685

Attorney for the Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to Walter E. Carson, Johns and Carson, 6840 Eastern Avenue, N.W., Washington, D.C. 20012; Frank M. Palmour, Rumberger, Kirk, Caldwell, Cabaniss & Burke, 11 East Pine Street, Orlando, Florida 32802 and to Joseph W. Carvin, Alley and Alley, Chartered, P. O. Box 1427, Tampa, Florida 32790.

/s/ John D. Maher

(5)

No. 85-993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAULA A. HOBBIE, *Appellant*,

v.

UNEMPLOYMENT APPEALS COMMISSION AND LAWTON AND COMPANY, *Appellees*.

On Appeal From The District Court Of Appeals Of The State Of Florida Fifth District

JOINT APPENDIX

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Referee's Decision:
Docket No. 84-14918U

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY
UNEMPLOYMENT COMPENSATION APPEALS BUREAU

NOTICE OF DECISION OF APPEALS REFEREE

Claimant: APPELLANT
S.S. No.: 100-36-7461
Paula A. Hobbie
c/o 2360 Virginia Drive
Altamonte Springs, FL 32714

Employer:
No.: -439586-A
Lawton and Co.
500 N. Orlando Avenue, Ste. 1264
Winter Park, FL 32789

Jurisdiction: 443.151(4)(a) & (b) F.S.

IMPORTANT

This decision will become final unless within (20) calendar days after the date it is mailed, you file an application for review to the Unemployment Appeals Commission, Room 221, Ashley Bldg., 1321 Executive Center Dr., East, Tallahassee, Florida 32301.

Other copies mailed to:

☒ UCCO -3632-0
☐ MU * ☒ Emp.'s Rep.
☐ ASLO ** ☒ Emp.'s Atty.
*** ☒ Clt.'s Atty.

APPEARANCES

CLAIMANT: YES
EMPLOYER: YES

FINDINGS OF FACT

The claimant was employed from October 4, 1981 through June 1, 1984, by the employer, first as a trainee and then as an

assistant manager. In April, 1984, the claimant informed her manager that she was being baptised in the Seventh-Day Adventist Church and that she would no longer be able to work from sundown on Friday to sundown on Saturday, because that was considered their Sabbath. The store manager and the claimant worked out a compromise which allowed him to cover for the claimant on Friday nights and Saturday, in return for which she would work evenings and Sundays for the manager. The general manager's supervisor became aware of the situation and informed the general manager that no exceptions could be made to the standard scheduling policy for the company. The company does not allow any management personnel to take Friday nights or Saturdays off as a permanent day off, as these are traditionally their heaviest retail sales days. The claimant worked three of the six weeks between her compromise with the manager and May 28, 1984. On May 28, 1984, the claimant was informed that she could no longer work evenings and Sunday in return for being off on Friday evenings and Saturday. The manager advised the claimant to speak to the general manager, who, after conferring with the claimant and her minister, advised her that the company could not make any allowances to give the claimant special scheduling privileges. The claimant was told following a meeting on June 1, 1984, that she would either work the days she was scheduled to work or they would accept her resignation. The claimant refused to resign and on the evening of June 1, 1984 she was asked for her keys. The claimant had previously worked on Saturdays for over two years.

CONCLUSIONS OF LAW: The law provides that "misconduct connected with work" means an intentional act or course of conduct by the worker in violation of his duties and obligations to the employer.

The record and evidence in this case show that the claimant was discharged for refusing to work scheduled hours on Saturdays due to religious beliefs. The testimony presented at the hearing by the employer shows that the claimant had worked on Saturdays and Friday evenings for an extended period of time and that she had accepted that as a condition of hire. The testimony of the employer shows that the claimant was given

the opportunity to continue her employment by working her regularly scheduled hours. The testimony of the claimant has not established that the employer's requirements of her were unreasonable in the context of her position and prior employment. It has been held that the law cannot be readily construed to require an employer to discriminate against other employees in order to enable others to observe their Sabbath. In view of the testimony presented by the employer and the claimant, it must be held that the claimant was discharged from the job for misconduct connected with the work when she refused to work the hours scheduled for her. The employer's testimony has established that, although there was a temporary solution to the problem of covering for the claimant on Fridays and Saturdays, this solution could not be guaranteed as being of a permanent nature and that it would not interfere with the rights of the other employees in the store.

DECISION: The determination of the claims examiner dated June 19, 1984, is affirmed.

This is to certify that on this date, July 20, 1984, a copy of the above decision was mailed to the last-known address of each interested party.

By:/s/Mary Dougherty
Deputy Clerk

/s/J.D. Finkbohner
J.D. FINKBOHNER
Appeals Referee
Winter Park, Florida
July 20, 1984

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STATE OF FLORIDA
UNEMPLOYMENT APPEALS COMMISSION

U.A.C. Order No. 84-3061

IN THE MATTER OF:

PAULA A. HOBBIE
SS No. 100-36-7461
Claimant/Appellant

vs.

LAWTON AND COMPANY
Employer No. -439586A
Employer/Appellee

UCCO Orlando 3632-0-12117

ORDER OF UNEMPLOYMENT APPEALS COMMISSION

Upon review pursuant to Section 443.151(4)(c), Florida Statutes, it is found that the decision of the appeals referee is in accord with the essential requirements of law and is, therefore, affirmed.

It is so ordered.

UNEMPLOYMENT APPEALS COMMISSION

R. Carson Dyal, Chairman
Delois Baskin, Member
Charlie Harris, Member

This is to certify that on Sep. 11, 1984, the above Order was filed in the office of the Clerk of the Unemployment Appeals Commission, and a copy mailed to the last known address of each interested party.

By/s/Donna Johnson
Deputy Clerk

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1985

CASE NO. 84-1491

PAULA HOBBIE

Appellant,

v.

UNEMPLOYMENT APPEALS COMMISSION
AND LAWTON & COMPANY,

Appellees.

NOT FINAL . . .

Decision filed September 10, 1985

Administrative Appeal from the Unemployment Appeals Commission.

Frank M. Palmour and Sharon Lee Stedman, of Rumberger, Kirk, Caldwell Cabaniss & Burke, Orlando, for Appellant.

Richard S. Cortese, Tallahassee, for Appellee Unemployment Appeals Commission.

John-Edward Alley and Joseph W. Carvin, of Alley and Alley, Chartered, Tampa for Appellee Lawton and Company.

PER CURIAM.

AFFIRMED.

COBB, C.J., UPCHURCH, F.J., and GOSHORN, G.S., Associate Judge, concur.

IN THE FIFTH DISTRICT COURT OF APPEALS
STATE OF FLORIDA

CASE NO. 84-1491

PAULA A. HOBBIE

Appellant,

vs.

UNEMPLOYMENT APPEALS COMMISSION AND
LAWTON AND COMPANY,

Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that PAULA A. HOBBIE, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Fifth District Court of Appeals, State of Florida, affirming the ruling of the Unemployment Appeals Commission, entered on September 10, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/Frank M. Palmour
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Joseph W. Carvin, Esquire, Alley and Alley, Chartered, Post Office Box 1427, Tampa, Florida, 33601, Counsel for Lawton and Company and Richard S. Cortez, Esquire, Ashley Building, Suite 221, 1321 Executive Center Drive East, Tallahassee, Florida, Counsel for Unemployment Appeals Commission.

/s/Frank M. Palmour
FRANK M. PALMOUR

No. 85-993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAULA A. HOBBIE, *Appellant*,

v.

UNEMPLOYMENT APPEALS COMMISSION AND LAWTON AND COMPANY, *Appellees*.

On Appeal From The District Court Of Appeals Of The State Of Florida Fifth District

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED FOR REVIEW

1. Does an employee's refusal for religious reasons to work on her Sabbath constitute "misconduct connected with work" so as to warrant denial by the state of unemployment insurance benefits when she is discharged?

2. Does Florida Statutes § 443.101 as construed and applied so as to deny unemployment insurance benefits to a person who refuses to work certain scheduled hours because of sincerely held religious convictions adopted after employment began violate the Free Exercise Clause of the First Amendment?

LIST OF ALL PARTIES

All of the parties appearing before the Supreme Court in this matter are listed in the caption of the Brief for Appellant.

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BRIEF FOR APPELLANT

OPINIONS BELOW

Hobbie was fired when she refused to work on her Sabbath. She applied for unemployment insurance benefits but was denied. On appeal her claim was heard by an Appeals Referee whose Decision of July 20, 1984, affirmed the denial of such benefits. (A copy of that Decision is set out in the Joint Appendix at p. 1; hereinafter cited as JA). The referee's determination was affirmed by the Florida Unemployment Appeals Commission on September 11, 1984, with a single sentence: "Upon review pursuant to § 443.151(4)(c), Florida Statutes, it is found that the decision of the appeals referee is in accord with the essential requirements of law and is, therefore, affirmed." (JA at 5). Hobbie appealed the Commission's Order to the

District Court of Appeal of the State of Florida, Fifth District. On September 10, 1985, that court issued its decision: "*Per Curiam*. Affirmed." (JA at 6). A "Notice of Appeal" to the U.S. Supreme Court was filed with the District Court of Appeal within 90 days of the entry of the final judgment (JA at 7).

GROUNDS ON WHICH JURISDICTION IS INVOKED

This is an appeal from a final *per curiam* judgment of the District Court of Appeal of the State of Florida Fifth District. Under Florida law a *per curiam* decision cannot be appealed to the Florida Supreme Court. See Rule 9.030(a)(2)(A)(ii), Florida Rules of Appellate Procedure. *See also, In Re Florida Rules of Appellate Procedure*, 391 So.2d 203 (Fla.1980).

The judgment confirmed a construction and application of Florida law so as to deny Hobbie rights secured by the Free Exercise Clause of the First Amendment. The state Unemployment Appeals Commission determined that her refusal to work on Sabbath constituted "misconduct connected with work" under Fla. Stat. Ann. § 443.101(1)-(a)2 (1982), and denied her unemployment insurance benefits. Hobbie has challenged this interpretation of the Florida statute argueing its repugnance to both the federal Constitution and the decisions of the Supreme Court.

This Court's jurisdiction on appeal is invoked by virtue of 28 U.S.C.A. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The constitutional provisions involved are found within the Religion Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . .
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The pertinent portion of the applicable federal statute pertaining to the Court's jurisdiction is as follows:

> 28 U.S.C.A. § 1257: Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The pertinent portions of the Florida statutes are as follows:

> § 443.021, Florida Statutes. Declaration of public policy.
>
> As a guide to the interpretation and application of this chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement

of social security requires protection against this greatest hazard of our economic life. This objective can be furthered by operating free public employment offices in affiliation with a nationwide system of employment services, by devising appropriate methods for reducing the volume of unemployment and by the systematic accumulation of funds during the periods of employment from which benefits may be paid for periods of unemployment thus maintaining purchasing power and limiting the serious social consequences of unemployment. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, subject, however, to the specific provisions of this chapter.

§ 443.101(1)(a)(2) Florida Statutes: Disqualification for being discharged for misconduct connected with his work shall continue for the full period of unemployment next ensuing after having been discharged and until such individual has become reemployed and has earned wages not less than 17 times his weekly benefit amount and for not more than 52 weeks which immediately follow such week, as determined by the division in each case according to the circumstances in each case or the seriousness of the misconduct, pursuant to rules of the division enacted for determinations of disqualification for benefits for misconduct.

§ 443.036(24) Florida Statutes: "Misconduct" includes, but is not limited to, the follow-

ing which shall not be construed in *pari materia* with each other:

(a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or

(b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent or evil design, or to allow an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

STATEMENT OF THE CASE

Lawton and Co., a Florida jeweler, hired Paula Hobbie in October of 1981. At the time of her discharge on June 1, 1984, she had been promoted to assistant manager.

When first hired, Hobbie was not a member of the Seventh-day Adventist Church. After a religious conversion she became a baptized member of the Church on May 19, 1984. In so doing, she adopted the belief that the seventh-day Sabbath, observed from sundown Friday to sundown Saturday, is a holy day to be devoted to spiritual activities. It is not disputed that her conversion was entirely *bona fide* and that her membership in the Church and adherence to its doctrines and beliefs are likewise *bona fide*.

Hobbie informed her immediate superior, Parks L. Heaton, of her new beliefs, indicating that she would be unable to work on the Sabbath. Acting on his own initiative, Heaton worked out an arrangement with Hobbie where she agreed to work for him on Sundays and he agreed to work for her whenever she was scheduled to

work on Friday nights after sunset or before sunset on Saturdays. This accommodation, made without the prior approval of Lawton and Company's upper management, proved successful for approximately two months (Tr. at 51, 57). Upon discovery, upper management immediately discontinued this arrangement and gave Hobbie an ultimatum either to work on her Sabbaths as scheduled, or quit (Tr. at 68). No attempt was ever made by upper management to accommodate Hobbie's new beliefs, despite her immediate supervisor's statement that their arrangement was working without any problem (Tr. at 59, 78, 79).

On June 1, 1984, Lawton and Company fired Hobbie, who then filed a claim with the Florida Department of Labor and Employment Security seeking unemployment insurance benefits. Lawton and Company contested the payment of such benefits claiming she had been "discharged for misconduct connected with work on June 1, 1984." The employer stated that she had been discharged because she "was not able to work hours needed as she had done for the past 2 years. Due to claimant's recent change in beliefs the claimant made herself unavailable for work on Friday and Saturday. The claimant was given the chance to work her normal hours as she had done for the previous 2-2½ years or terminate her employment" (Tr. at 4).

The Florida Department of Labor and Employment Security Bureau of Unemployment Compensation denied Hobbie's application for benefits. She appealed this determination to the Unemployment Compensation Appeals Board. During the administrative hearing, the sincerity of Hobbie's religious beliefs was never questioned; neither did the employer offer any evidence suggesting that it had suffered injury, damage or other hardship as a result of

Hobbie's request for a religious accommodation. The testimony did not reflect any attempt by Lawton and Company, other than what Hobbie and her immediate supervisor had worked out among themselves, to effect an accommodation of her beliefs. Nor did the State introduce any evidence indicating that payment to Hobbie of unemployment insurance benefits would create a hardship. Nevertheless, the Appeals Referee denied Hobbie benefits, concluding that she had been discharged for "misconduct connected with work."

This decision was appealed to the Florida District Court of Appeals, Fifth District, which issued a *per curiam* affirmance on September 10, 1985. Since under Florida law, a *per curiam* decision cannot be appealed to a higher state court, Hobbie appealed directly to the United States Supreme Court.

SUMMARY OF ARGUMENT

A statute which is construed to disqualify from unemployment insurance benefits one who adopts a new Sabbatarian faith deprives her of the free exercise of her religion. Religious conversion does not constitute "misconduct" for purposes of qualifying for unemployment benefits, because conversion is a fundamental right protected by the Constitution. The State of Florida may constitutionally infringe this right only for compelling reasons, and only if there is no less restrictive alternative. Here, the State of Florida has no reason at all to deny Hobbie her rights, much less has the State shown any compelling interest.

The Court has held that a State may not condition the receipt of public benefits on the relinquishing of one's constitutional rights. However, Florida has put Hobbie to the cruel choice between fidelity to her conscience and

receiving public benefits. Such state induced economic coercion has been held unconstitutional in *Sherbert* v. *Verner* and *Thomas* v. *Review Board*. To disqualify only those who adopt a religion in the first instance is to convey a message of government hostility towards religious conversion. Such hostility violates the Establishment Clause, and to the extent that it discriminates against the members of religions that proselytize, it is a denial of equal protection of the law as well.

ARGUMENT

I. THE SUPREME COURT HAS JURISDICTION UNDER 28 U.S.C.A. § 1257(2).

Paula Hobbie has been deemed ineligible for unemployment benefits under Fla. Stat. Ann. § 443.101(1)(a)(2). Her religious conversion and subsequent inability to work on Sabbath were found by the State of Florida to constitute "misconduct" under the statute. Such an interpretation deprives her of the constitutional right to the free exercise of religion.

Under federal law, U.S.C.A. § 1257(2), the final judgment rendered by the highest court of a state in which the validity of a state statute is challenged may be appealed to the Supreme Court. Hobbie challenges the validity of Fla. Stat. Ann. § 443.101(1)(a)(2) as construed and applied to the facts of this case.

The pertinent language of 28 U.S.C.A. § 1257(2) requires that the validity of the state statute be "drawn in question" during the state court proceeding. All parties satisfied this requirement in the briefs presented to the State Court of Appeals. In *Supreme Court Practice*, the requirements for raising a federal question are stated:

> In framing the federal question for presentation to the state court, the litigant is not bound to follow any particular form of words or phrases. It is essential only that he bring the federal claim and the grounds therefor to the state court's attention with fair precision. And "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." *New York ex. rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67.

Stern & Gressman, *Supreme Court Practice* 210 (5th Ed. 1978).

The central issue argued by both sides in the Florida Court of Appeals was whether the statute as applied deprived Hobbie of her constitutional rights. As stated in Hobbie's brief:

> The Appeals Referee erred in holding as a matter of law under Florida Statute 443.101(1) that appellant's refusal to work scheduled hours on friday evenings and saturdays as the result of religious conviction constituted misconduct connected with her work in that said ruling constitutes the denial of unemployment compensation benefits to appellant in deprivation of her guaranteed right to the free exercise of her religion under the First Amendment to the United States Constitution.

Record at 4. Hobbie relied on *Sherbert* v. *Verner*, 374 U.S. 398 (1963); and *Thomas* v. *Review Board*, 450 U.S. 707 (1981) as controlling precedent requiring an interpretation of the statute that would exclude religious conversion from being considered misconduct under the applicable law.

The Second Argument of the Answer Brief of Florida's Unemployment Appeals Commission also specifically ad-

dressed the Constitutional issue. It stated, "the denial of unemployment compensation to the claimant did not constitute state action that was a substantial infringement of the claimant's First Amendment right to the free exercise of her religion." This argument, too, relied on *Thomas* and *Sherbert*, while attempting to factually distinguish these cases from Hobbie's situation.

There is no question that Hobbie properly raised a constitutional challenge to the application of the Florida statute to her conversion. So long as the state court decision upholds the validity of a state statute against a constitutional challenge, it is not necessary for the court to issue an opinion specifically addressed to that issue. It is the effect, not the reasoning, that is significant. As Stern & Gressman comment:

> In the setting of § 1257(2), *an appeal will lie even though the state court is not explicit* in overruling a timely challenge on federal grounds to the validity of the state statute, although the challenge itself must be explicit. *As long as the statute is sustained, the court has necessarily rejected such an objection. Its silence in this respect is immaterial and cannot destroy the right to appeal under § 1257(2)*—a result in sharp contrast with the significance under § 1257(1) of silence relative to a claimed invalidity of a federal statute or treaty. Thus an erroneous failure to pass on the federal constitutional objections to the state statute is treated as equivalent to a finding of validity within the meaning of § 1257(2), so that an appeal will lie. *Lawrence* v. *State Tax Commission*, 286 U.S. 276, 282-283.

Stern & Gressman, *Supreme Court Practice* 163 (5th Ed. 1978) (emphasis added).

The effect of the Florida court's *per curiam* decision is to uphold the statute, as applied, in the face of a constitutional challenge. The absence of any stated grounds for the decision cannot deprive Hobbie of her right to an appeal. As this Court has stated:

> But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked.

Lawrence v. *State Tax Commission*, 286 U.S. 282, 283 (1932).

This Court has held in similar cases that where a final decision of a state court has sustained the validity of a state statute in the face of a federal constitutional challenge, an appeal to the United States Supreme Court lies as a matter of right. *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, *reh'g denied*, 421 U.S. 971 (1975). Furthermore, where the right to appeal exists, the Supreme Court lacks discretion to refuse adjudication of the case on its merits as it would if the case is brought by writ of certiorari. *Hicks* v. *Miranda*, 422 U.S. 332 (1975).

Florida would mistakenly rely on the fact that the *per curiam* affirmance is without precedential value. The issue here, however, is whether Hobbie is entitled to unemployment benefits. The Court of Appeals decision effectively resolved that question in the negative. The precedential value of the decision is irrelevant to the Supreme Court's jurisdiction in this case, since a present controversy exists and Hobbie's constitutional rights have been denied. Moreover, a holding by this Court that jurisdiction is lacking would show the states how constitutional rights can be denied by administrative hearing officers, whose rulings would then be affirmed by a non-

reviewable *per curiam* decision by a state appellate court. This procedural technicality would effectively insulate such rulings from federal review.

The Florida Court of Appeals' *per curiam* decision interpreted the unemployment compensation statute to find that Hobbie's religious conversion and resulting conflict with her employment constituted misconduct. As a consequence, she was disqualified from receiving unemployment benefits. The constitutional challenge to her denial of such benefits was raised in the Administrative Hearing (Hearing Transcript at 108, 109) and in the Florida Court of Appeal. Under 28 U.S.C.A. § 1257(2), jurisdiction is properly vested in the U.S. Supreme Court.

II. RELIGIOUS CONVERSION IS PROTECTED BY THE FIRST AMENDMENT AND DOES NOT CONSTITUTE MISCONDUCT OR FAULT FOR PURPOSES OF DENYING UNEMPLOYMENT COMPENSATION BENEFITS.

A. This Case Is Controlled By *Thomas* v. *Review Board* And *Sherbert* v. *Verner*.

Unemployment benefits are available in the State of Florida to persons who become "unemployed through no fault of their own." Fla. Stat. Ann. § 443.021. Persons discharged due to "misconduct" are not entitled to benefits. Fla. Stat. Ann. § 443.131(3)(a). Every other state in the nation has comparable statutory language.[1]

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[1] Ala. Code § 25-4-78 (1975); Alaska Stat. § 23.20.379 (1962); Ariz. Rev. Stat. Ann. § 23-775 (1956); Ark. Stat. Ann. § 81-1106 (1974); Cal. Unemp. Ins. Code § 1256 (West 1953); Colo. Rev. Stat. § 8-73-108 (1973); Conn. Gen. Stat. Ann. § 31-236 (West 1958); Del. Code Ann. tit. 19 § 3315 (1974); D.C. Code Ann. § 46-310 (1973); Ga. Code Ann. § 34-8-158 (1982); Hawaii Rev. Stat. § 383-30 (1976); Idaho Code § 72-1366 (1947); Ill. Ann. Stat. ch. 48 § 432 (Smith-Hurd 1935); Ind. Code Ann. § 22-4-15-1 (Burns 1971); Iowa Code Ann. § 96.5 (West 1939); Kan. Stat. Ann. § 44.706 (1964); Ky. Rev. Stat. § 341.370 (1970); La. Rev. Stat. Ann. § 23:1601 (West 1950); Me. Rev. Stat. Ann. tit. 26, 1193 (1964); Md. Ann. Code art. 95A, § 6 (1957); Mass. Gen. Laws Ann. ch. 151A, § 25 (West 1958); Mich. Comp. Laws Ann. § 421.29 (West 1948); Minn. Stat. Ann. § 268.09 (West 1946); Miss. Code Ann. § 71-5-513 (1972); Mo. Ann. Stat. § 288.050 (Vernon 1949); Mont. Code Ann. § 87-106 (1985); Neb. Rev. Stat. § 48-628 (1943); Nev. Rev. Stat. § 612.385, 612.380 (1957); N.H. Rev. Stat. Ann. § 282:4 (1955); N.J. Stat. Ann. § 43:21-5 (West 1939); N.M. Stat. Ann. § 51-1-7 (1978); N.Y. Lab. Law § 593 (McKinney 1939); N.C. Gen. Stat. § 96-14 (1965); N.D. Cent. Code § 52-06-02 (1959); Ohio Rev. Code Ann. § 4141.29 (Page 1953); 40 Okl. Stat. Ann. § 2-404 (West 1971); Or. Rev. Stat. § 657.176 (1953); Pa. Stat. Ann. tit. 43, § 802 (Purdon 1970); R.I. Gen. Law § 28-44-18 (1956); S.C. Code Ann. § 41-35-120 (Law Co-op 1976); S.D. Comp. Laws Ann. § 61-6-13, 61-6-14 (1967); Tenn. Code Ann. § 50-7-303 (1956); Tex. Rev. Civ. Stat. Ann. art. 5221b-3 (Vernon 1958); Utah Code Ann. § 35-4-5 (1953); Vt. Stat. Ann. tit. 21, § 1344 (1958); Va. Code § 60.1-58 (1950); Wash. Rev. Code Ann. § 50.20.060 (1961); W. Va. Code § 21A-6-3 (1966); Wis. Stat. Ann. § 108.04 (West 1957); Wyo. Stat. § 27-3-311 (1977).

If religious conversion is found to constitute "misconduct" in the instant case, states across the country will discourage persons, and in some cases economically prohibit them, from converting to religions whose practices may come into conflict with employment opportunities. Not only will such persons be faced with a "cruel choice of surrendering their religion or their job," they will be forced by the state to choose between their religion and the receipt of unemployment insurance benefits as well. *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 87 (1977) (Marshall, J. dissenting).

Such compulsion of the conscience by state sanctioned economic coercion flies in the face of stated Free Exercise values, and is prohibited by the Court's ruling in *Thomas* v. *Review Board*, 450 U.S. 707 (1981):

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it *denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs*, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

450 U.S. at 717, 718 (emphasis added).

In *Thomas*, a Jehovah's Witness worked for a company that manufactured military hardware. Initially, his work did not directly involve the production of weapons. Because of a partial plant closure, however, Thomas was transferred to an assembly line directly manufacturing weapons. His religious beliefs forbade him from working directly on weapons production. Since the remaining facilities of the company all produced weapons, Thomas quit his job. Like Hobbie, the state denied Thomas unemployment benefits. The Supreme Court held that Thomas was entitled to unemployment benefits, as he had been put to a choice between his conscience and his job. His quitting, therefore, was for "good cause." *Id.* at 712, 713.

The *Thomas* case is so factually similar to the instant case that it must be deemed controlling precedent. The coercive element in *Thomas* was his being forced to choose between conscience and job. Having followed his religious beliefs, the state could not then withhold unemployment benefits. The same is true for Hobbie. She was put to a direct choice between continuing to work on her Sabbath, or being fired. Thus, the coercive element in this case is indistinguishable from *Thomas*.

Thomas, in turn, was controlled by *Sherbert* v. *Verner*, 374 U.S. 398 (1963). *Sherbert* involved a Seventh-day

Adventist, like Hobbie, who was fired because of her inability to work on Saturdays. Mrs. Sherbert was denied unemployment benefits as she was considered "unavailable" for work. In order to be eligible for unemployment benefits in South Carolina, a person was required to be "able to work . . . available for work . . . [and] to accept available suitable work when offered him by the employment office or the employer." *Id.* at 400, 401. Sherbert was unable to find work that did not require Sabbath labor. The state denied her unemployment benefits, saying that she was unavailable for work, since she refused to work on Saturdays.

The South Carolina Supreme Court, ruling against Sherbert, declared that such denial of benefits "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience." 240 S.C. 286, 303-304, 125 S.E.2D 737, 746; *quoted in*, *Sherbert*, 374 U.S. at 401.

However, the United States Supreme Court rejected this reasoning. Citing *Braunfield* v. *Brown*, 366 U.S. 599 (1961), the Court insisted that "[i]f the purpose or effect of a law is to *impede the observance of one or all religions* or is to discriminate invidiously between religions, that law is *constitutionally invalid even though the burden may be characterized as being only indirect.*" *Id.* at 607 (emphasis added). In *Sherbert*, the state's action directly forced Sherbert "to choose between . . . following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Id.* at 404.

The State of Florida's determination against Hobbie has an identical effect. By not providing her with unem-

ployment benefits to support her between jobs, the State put Hobbie under great economic pressure to accept any employment regardless of whether it required Saturday work. Hobbie, like Sherbert, has been directly coerced by the State into "abandoning one of the precepts of her religion in order to accept work." *Id.*

State coercion of religious conscience is offensive whenever it occurs. Yet the coercive force is most offensive when brought to bear on a person contemplating a change of religion, or upon the new convert. Such persons are especially vulnerable to the state's coercive influence because their faith is just blossoming and not yet deeply rooted. Writing about the importance to the state of protecting conscience, the remarks of Harlan Fiske Stone, later Chief Justice, are especially true where the conscientious faith is recently adopted.

> [B]oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.

Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).

Florida relies on a single factual distinction in arguing that *Sherbert* and *Thomas* should not control: Hobbie was the "agent of change." In both *Sherbert* and *Thomas*, it

was the employer who changed the conditions of employment. Florida argues that Hobbie's case must be distinguished because she was somehow at fault for converting to a new religion and thereby unable to satisfy the terms and conditions of her employment. This distinction must be rejected.

Where the free exercise of religion is involved, whether it was the employer or employee who caused the conflict is irrelevant to the issue of eligibility for unemployment benefits. *Sherbert* and *Thomas* stand for the proposition that public benefits simply cannot be conditioned on the inhibition or deterrence of the exercise of First Amendment freedoms. *See also, Speiser* v. *Randall*, 357 U.S. 513 (1958). The date of Hobbie's conversion bears no relation to the salient issue which is the degree of coercion involved. Florida insists that when an employee's religion conflicts with the terms of employment, resulting in discharge, eligibility for unemployment benefits should be conditional upon the employee's non-conversion. However, the Court has repeatedly declared:

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or *placing of conditions upon a benefit or privilege. American Communications Assn.* v. *Douds*, 339 U.S. 382, 390; *Wieman* v. *Updegraph*, 344 U.S. 183, 191-192; *Hannegan* v. *Esquire, Inc.* 327 U.S. 146, 155-156.

Sherbert, 374 U.S. at 404, 405 (emphasis added).

The very notion that religious belief can constitute "fault" or "misconduct" is repugnant to the Constitution. The choice of one's religious faith is a cherished American freedom and cannot be infringed by statutory interpretation. Furthermore, the stated purpose of Florida's unemployment compensation laws rejects such a construction.

In its "Declaration of public policy," the statute declares the reason for providing unemployment benefits: "[e]conomic insecurity due to unemployment is a serious menace to the health, *morals*, and welfare of the people of this state." Fla. Stat. Ann. § 443.021 (emphasis added). It is incongruous to interpret a statute designed to protect the morals of the people so as to be hostile to an individual's religious practice.

Finally, a major difficulty with the "agent of change" argument is that it is factually incorrect in this case. Hobbie had worked out an accommodation with her immediate supervisor, the manager of the Winter Park store, that was working well up to the time she was fired. The manager had informed his superiors that the arrangement was satisfactory (Tr. at 59). Although the employer's duty to accommodate is not an issue in this case,[2] the record clearly demonstrates that upper management rejected an existing accommodation and insisted that Hobbie either work her regularly scheduled Saturdays, or quit. When she refused, she was fired. Thus, "the agent of change" in this case was the employer, not Hobbie.

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[2] Appellee's Motion to Dismiss or Affirm asserts that the issue is whether an employee who converts can "force her employer to change the conditions of her employment to accommodate her new religious convictions." *Motion* at 17. This is clearly not an issue in this case. The employer's duty to accommodate the religious beliefs of employees is governed by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. 2000e et seq. This case does not allege employment discrimination under the federal statute. Although the facts of this case suggest that Hobbie likely would have prevailed in such an action, the employer's legal obligation to accommodate Hobbie is irrelevant to the issue of eligibility for unemployment benefits. Even if Lawton and Co. was legally entitled to dismiss Hobbie, she would still be entitled to receive unemployment compensation.

The only state courts that have considered the "agent of change" theory have rejected it. Of the cases cited by Florida in its Motion to Dismiss or Affirm, only two are on point. (Motion at 11, 12). Four cases involved situations where the employee had accepted the job knowing that there was a religious conflict. *Hildebrand* v. *Unemployment Ins. Appeals Bd.*, 140 Cal. Rptr. 151, 566 P.2d 1297 (1977); *cert denied*, 434 U.S. 1068 (1978); *Levold* v. *Employment Security Department*, 604 P.2d 175 (Wash.App.1979); *DePriest* v. *Puett*, 669 S.W.2d 669 (Tenn.App.1984); *DePriest* v. *Bible*, 653 S.W.2d 721 (Tenn.App.1980). These present a very different issue than the present case, since such conduct is concededly unfair to the employer. Hobbie did not accept employment knowing there was a religious conflict.

The first court to consider the "agent of change" theory was a Colorado Court of Appeals, in *Martinez* v. *Industrial Commission of Colorado*, 618 P.2d 738 (Colo.1980). In *Martinez*, decided before *Thomas*, the employee adopted religious beliefs after commencement of employment, resulting in a conflict with his job. The court denied unemployment benefits to Martinez. Three years later, however, the same court decided *Engraff* v. *Industrial Commission*, 678 P.2d 564 (Colo.App.1983) and in light of *Thomas*, effectively reversed its holding in *Martinez*. Engraff was employed by the Colorado Public Service Company in 1972. In 1980 he notified his employer that he had joined a religious organization that forbade him from engaging in certain conduct. Ultimately, he was fired because of this belief.

The Colorado court's analysis warrants careful consideration:

> While Colorado's Employment Security Act does not directly penalize Engraff for his

religious beliefs, the application of the Act in this instance had the effect of forcing him to choose between fidelity to those beliefs and the forfeiture of benefits on the one hand and abandonment of those beliefs to accept suitable work on the other. See *Sherbert* v. *Verner.* The Industrial Commission's imposition of this choice 'puts the same kind of burden upon the free exercise of religion as would a fine imposed against' Engraff for his wearing a turban or refusing to cut his facial hair in conformity with his religious beliefs, *Sherbert* . . . . Thus, here, though neutral on its face, the Act in its application, offended the constitutional requirement for governmental neutrality because it unduly burdened Engraff's free exercise of religion. *Wisconsin* v. *Yoder*, . . . *Sherbert*, and, *Thomas* v. *Review Bd.* . . . require that, should the State burden the free exercise of religion, it must do so in the least restrictive available way to achieve a compelling state interest.

Engraff v. *Industrial Commission*, 678 P.2d 564, 567 (Col.1983) (citations omitted). In overturning the *Martinez* decision, the court held that to focus on the fact that it was the employee who changed the terms of employment:

> places primary importance on the timing of Engraff's religious conversion and ignores the burden placed on the free exercise of his religious beliefs. Engraff should not be penalized because he did not embrace his faith at the "proper time." . . . In light of *Thomas* v. *Review Board*, . . . decided after *Martinez*, we consider the distinctions made in *Martinez* to be untenable and, thus, do not follow that case.

Engraff, 678 P.2d at 568 (citations omitted).

A Michigan Court of Appeals also rejected the "agent of change" theory as inconsistent with the guarantee of religious liberty.

> The only factual difference between this case and the Supreme Court precedents [*Sherbert* and *Thomas*] is that the claimant herein adopted her religious beliefs after gaining employment. *We do not accept the view that the first Amendment protects the right to adhere to religious beliefs, but not the right to adopt such beliefs in the first instance or convert from one faith to another* . . . The important factor, common to the three cases, is that "the employee was put to a choice between fidelity to religious belief or cessation of work." *Thomas.*

Key State Bank v. *Adams*, 360 N.W.2d 909, 913 (Mich.1984) (citation omitted) (emphasis added). Accordingly, the "agent of change" theory must be rejected and this case controlled by *Sherbert* and *Thomas.*

B. The Free Exercise Clause Protects Hobbie's Choice Of Religious Beliefs

In order to determine whether a state statute may constitutionally infringe the religious beliefs or practices of an individual, the Court has frequently applied a three part analysis. The claimant must first show that the challenged state action imposes a burden on the free exercise of religion. The state must then demonstrate that it has a compelling interest justifying the burden on religious freedom, and in addition, that there is no less restrictive means of achieving that interest. *United States* v. *Lee*, 455 U.S. 252 (1982); *Thomas*, 450 U.S. 707 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Sherbert*, 374 U.S. 398 (1963). The Court summarized this test in *Yoder*: "[t]he essence of all that has been said and written on the subject

is that *only those interests of the highest order* and those not otherwise served can overbalance legitimate claims to the free exercise of religion." 406 U.S. at 215. (emphasis added).

The sincerity of Hobbie's Sabbath belief has not been questioned. The issue is whether coercion exists, and if so, whether the state can justify it. As the preceeding analysis has shown, the coercion in this case is identical to that in *Thomas* and *Sherbert*. Thus, there can be no doubt that the State's action infringes Hobbie's religious liberty.

The burden then shifts to Florida to show a compelling interest sufficient to override the burden on Hobbie's religion. The State has failed to demonstrate that its interest in denying benefits to Hobbie is any more compelling than the state's interest was in *Sherbert* and *Thomas*. In those cases, the Court has ruled that states do not have any compelling interest sufficient to justify denial of unemployment benefits to persons unemployed for religious reasons. *Thomas*, 450 U.S. 707; *Sherbert*, 374 U.S. 398. The record in this case is silent as to any costs that the State may have incurred, neither has Florida shown any other compelling interest. Without such evidence, Florida has no basis to assert an interest justifying infringement of Hobbie's religious liberty. In fact, any costs to Florida would be minimal. Assuming arguendo, that the State were to demonstrate that the number of claims filed based on religious reasons had increased, such marginal increases in the State's cost would not constitute an overriding interest so as to permit the denial of fundamental religious freedoms. Under Free Exercise clause doctrine, Florida simply has no defense.

The State will find no solace in the Court's recent decision in *Bowen* v. *Roy*, 54 U.S.L.W. 4603 (1986). *Bowen*

was a unique case which did not purport to overturn twenty-five years of Free Exercise decisions. It involved an American Indian family cut off from AFDC (Aid to Families with Dependent Children) and Food Stamp benefits because of their refusal, on religious grounds, to use their daughter's social security number as required by the government. The Court focused on the fact that the family was dictating to the government how to run its internal affairs. The Court specifically distinguished the case from other Free Exercise Clause cases involving the state's conditioning the receipt of benefits on the compromising of one's religion. In *Bowen*, Roy attempted to require the government to act in accordance with his religious beliefs. The Court ruled that Roy could no more dictate government procedures in administering its benefit programs than he could "the size or color of the government's filing cabinets." *Id.* at 4605.

That the holding in *Bowen* should not be generally applied to all cases involving important government functions is illustrated by comparison with *United States* v. *Lee*, 455 U.S. 252 (1982). In *Lee*, an Amish man objected to the payment of social security taxes. A statute provided an exemption from such taxes for Amish who were self-employed, but failed to include those who employed other Amish, as did Lee. The Court refused to extend the statute beyond its terms, or to find a required exemption from social security on religious freedom grounds. Although the *Lee* decision involved an integral government function akin to the Food Stamp or Unemployment compensation programs at issue in *Bowen* and *Hobbie*, the Court applied the traditional three part Free Exercise analysis. It stated: "(n)ot all burdens on religion are unconstitutional . . . The state may justify a limitation on religious liberty by showing that it is essential to accom-

plish an overriding governmental interest." 455 U.S. at 257, 258 (citations omitted).

Hobbie does not request that Florida change its internal operations to accommodate her religion. She asks only that her claim be administered in exactly the same manner as for other workers. Thus, *Bowen* does not control the present case. Rather, applying the three part analysis used in *Lee* and other Free Exercise cases, it is clear that Florida cannot justify its infringement of Hobbie's religious liberty. No overriding governmental interest has been shown in this case.

C. Payment Of Unemployment Insurance Benefits To Hobbie Does Not Violate The Establishment Clause

Florida cannot justify the denial of unemployment benefits to Hobbie by asserting a compelling state interest under the Free Exercise Clause of the First Amendment. Neither can it use an Establishment Clause challenge to overturn a long line of cases requiring the state to accommodate an individual's religious beliefs. The Court has explicitly rejected such a challenge in both *Thomas* and *Sherbert*.

> In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. *Sherbert* v. *Verner*, 374 U.S. at 409.

quoted in, *Thomas*, 450 U.S. at 720.

The state of Florida would not be establishing the Seventh-day Adventist religion by paying unemployment benefits to Hobbie in common with other persons unemployed.

In Establishment Clause cases, the Court has often applied a three part test enunciated in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). This test requires that all legislation, to pass muster under the Establishment Clause, must have a secular purpose, a secular effect, and must not excessively entangle church and state. Under this test, the interpretation of the Florida statute, excluding religious conversion from disqualification for unemployment benefits as "misconduct," is not an establishment of religion. Undeniably, the purpose of the statute is wholly secular: "to lighten [unemployment's] burden which now so often falls with crushing force upon the unemployed worker and his family." Fla.Stat.Ann. § 443.021. Neither is there any entanglement between church and state, since there is no contact between government and any religious organization. If there is a problem, it must be with the statute's alleged religious effect. The only effect of the statute is to pay Hobbie unemployment benefits when she was fined because of a conflict between her newly adopted religious beliefs and her job requirements. Certainly, the Court did not find this to be a problem in *Thomas* or *Sherbert*.

The recent case of *Witters* v. *Washington Department of Services for the Blind*, 106 S.Ct. 748 (1986), suggests a method of analysis when state financial support for religious individuals is involved. In *Witters*, like Hobbie, a neutral state statute was challenged on Establishment Clause grounds. This law provided educational assistance to blind students. Witters had been denied such aid because he was studying thelogy to become a minister at a church-related college. The Court declared:

> It is well-settled that the Establishment Clause is not violated every time money previously in the possession of a State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.
>
> . . . Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients.

106 S.Ct. at 751, 752.

The aid to Witters was acceptable because its purpose and effect was to assist blind people, not blind religious people or religious institutions. The fact that an individual pursuing a religious purpose was aided, even one who would use the money to train for a religious vocation, was irrelevant. In Hobbie's case, the unemployment benefits are paid to a person who is unemployed through no fault of her own, not because she is religious. The effect is not to aid religion, per se, but to fulfill the valid secular goal for which unemployment compensation was created: to alleviate the hardship of losing one's job. Certainly, the support of religion by payment of benefits to Hobbie is far less than that of financing Witters' ministerial education.

Justice Powell, concurring in *Witters*, clarified the aid issue even further. The Washington Supreme Court that rejected Witters' claim, said Powell, concluded that:

> the program had the practical effect of aiding religion *in this particular case*. *Witters* v. *State Commission for the Blind*, 102 Wash.2d 624, 628-629, 689 P.2d 53, 56 (1984). In effect, the court analyzed the case as if the Washington legislature had passed a private bill that awarded respondent free tuition to pursue religious studies.
>
> Such an analysis conflicts with both common sense and established precedent. Nowhere in *Mueller* did we analyze the effect of Minnesota's tax deduction on the parents who were parties to the case; rather, we looked to the nature and consequences of the program *viewed as a whole*. *Mueller*, . . . 463 U.S. at 397-400.

106 S.Ct. at 754 (emphasis added).

Even where the practical effect of a neutral statute is to aid religion in a particular case, that alone is not enough to invalidate the statute. The proper perspective is to view the statute "as a whole." An Establishment Clause challenge to the Florida statute is only possible if the legislation was passed to aid Hobbie individually. Viewed as a whole, the program clearly aids all kinds of people who are fired, whether religious or not, and whether the reason for their firing was based on religious grounds or not. As Justice Stevens observed in *United States* v. *Lee: Thomas* and *Sherbert* may "be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect." *Id.*, at 265. To single out religious employees for exclusion from unemployment benefits when they are fired through no fault of their own would deny them the equal protection of the laws. A holding that religious conversion is not "misconduct" would not single out religious persons or, for that matter, religions, for special treatment. Such a construction would recognize that religious conversion is one of many valid events that would not otherwise disqualify employees from receiving unemployment compensation.

This Court used similar reasoning to validate the tax exemption of religious organizations in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). In *Walz*, churches were considered to be part of a class including many types of charitable organizations such as schools, hospitals, and libraries, all eligible for tax exemption. As the Court observed:

> these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community.

Walz, 397 U.S. at 687. Religious bodies were not singled out for special, favored treatment. Rather, they were treated equally with those in the same class. The Court upheld the tax exemption of churches in the face of Establishment Clause arguments that exemption provided both symbolic and financial support to churches. It cannot seriously be contended that the payment of unemployment benefits to Hobbie would aid religion nearly as much as tax exemption aids churches. If churches can be treated equally with other types of charities, so too must Hobbie be treated equally with others eligible for unemployment benefits.

Although the Court has occasionally suggested that the two religion clauses are in conflict, *E.g.*, *Walz*, 397 U.S. 664, it has repeatedly recognized the existence of a "general harmony of purpose between the two religion clauses of the First Amendment." *Gillette* v. *United States*, 401 U.S. 437, 461 (1971). "The ultimate First Amendment

objective," Justice Goldberg declared, is "religious liberty." *Abington School District* v. *Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J. concurring). "The Framers did not entrust the liberty of religious beliefs to either clause alone." *Schempp*, 374 U.S. at 256 (Brennan, J. concurring). Thus, the Establishment Clause is a "coguarantor, with the Free Exercise Clause, of religious liberty." *Id.* More recently, the Court declared that "under the Religion Clauses, Government must guard against activity that impinges on religious freedom." *Thornton* v. *Caldor, Inc.*, 105 S.Ct. 2914, 2917 (1985). Thus, "although a distinct jurisprudence has enveloped each of these clauses, *their common purpose is to secure religious liberty.* See *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962)" *cited in*, *Wallace* v. *Jaffree*, 104 S.Ct. 2479, 2496 (1985) (O'Connor, J. concurring) (emphasis added).

Because the two religion clauses are essentially in harmony they should not readily be interpreted to conflict. The Court should consider the underlying purpose of both clauses, which is to protect and promote religious liberty. This the Court has consistently done by recognizing the constitutional validity of statutory exemptions or accommodations. *E.g. Welsh* v. *United States*, 398 U.S. 333 (1970); *Selective Draft Law Cases*, 245 U.S. 366 (1918) (conscientious objection); *United States* v. *Lee*, 455 U.S. 252 (1982) (approving exemption from social security tax for self-employed but not for employees); *Bowen* v. *Roy*, 54 U.S.L.W. 4603 (1986) (approving statutory protection for American Indian religious freedom); *Walz*, 397 U.S. 664 (1970) (tax exemption of churches). The principle of religious freedom has similarly guided the Court to judicially create exemptions to resolve Free Exercise conflicts with facially neutral statutes. *E.g. Wisconsin* v. *Yoder*, 406 U.S. 205 (1972) (exempting Amish children

from compulsory attendance at high school); *West Virginia Board of Education* v. *Barnette*, 329 U.S. 624 (1943) (exempting a Jehovah's Witness child from compulsory flag salute in public school).

The unifying principle of religious freedom, properly applied, does not discover an Establishment Clause challenge to every case involving the free exercise of religion. Rather, the purpose is to protect the practice of religion while upholding the separation of church and state. As this case presents no problem of government involvement with the church or with religion in any manner, the Establishment Clause challenge is frivolous. In the face of such an obvious infringement of Hobbie's right to choose her religious belief, any conceivable Establishment Clause concerns become inconsequential.

D. The Choice Of Religious Belief Is A Fundamental Liberty Protected By The Constitution And Cannot Be Considered Misconduct

The three part Establishment Clause analysis provides no rational basis to deny unemployment benefits to Hobbie. Properly understood, the Establishment Clause requires the State to provide Hobbie the same benefits it offers to others. The right to adopt a religious belief is fundamental to the American scheme of ordered liberty, as this Court has consistently proclaimed in a long line of cases, and cannot be infringed by statutory construction.

> *"Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."* *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940) (emphasis added).

"Fundamental to the conception of religious liberty protected by the Religion Clauses is the idea that religious beliefs are a matter of voluntary choice by individuals and their associations. . . ." *McDaniel* v. *Paty*, 435 U.S. 618, 640 (1978). And:

> The individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority . . . the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces *the right to select any religious faith* or none at all.

Wallace v. *Jaffree*, 105 S.Ct. 2479, 2488 (1985) (emphasis added).

These statements declare that religious conversion is protected by both clauses of the First Amendment. Justice Black specifically identified the Establishment Clause as offering such protection in his classic statement in *Everson* v. *Board of Education*, 330 U.S. 1 (1947).

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church . . . Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be *punished for entertaining or professing religious beliefs or disbeliefs*.

330 U.S. at 15, 16 (emphasis added). Justice Black further stated:

> [N]o State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it* from receiving the benefits of public welfare legislation.' *Everson* v. *Board of Education*, 330 U.S. 1, 16.

quoted in, *Sherbert* v. *Verner*, 374 U.S. at 410 (emphasis in original).

In the instant case, Florida would deny Hobbie unemployment benefits because her change of faith occurred at the wrong time. Such a denial would penalize her for conversion, since there is no contention that Hobbie would not otherwise be eligible for benefits had she been a Seventh-day Adventist when hired. *Thomas*, 450 U.S. 707. To single out the practice of conversion for disfavored treatment when other religious beliefs and practices are protected is to discriminate against persons who convert and religions that proselytize. Such discrimination not only violates the Establishment Clause, but constitutes a denial of equal protection as well, in violation of the Fourteenth Amendment.

Justice Douglas, writing to uphold the constitutionality of a program of releasing children from public schools to receive religious education, declared:

> We are a religious people whose institutions presuppose a Supreme Being. *We guarantee the freedom to worship as one chooses.* We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. *We sponsor an attitude on the part of government* that shows no partiality to any one group and *that lets each flourish according to the zeal of its adherents and the appeal of its dogma.* When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and *accommodates the public service to their spiritual needs.* To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe . . . (W)e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Zorach v. *Clauson*, 343 U.S. 306, 313-314 (1952) (emphasis added).

A finding that religious conversion badly timed constitutes misconduct utterly fails to accommodate the "public service" to the spiritual needs of those, like Hobbie, who choose a religious faith after commencing employment. It certainly does not evidence "an attitude on the part of government . . . that lets [religion] flourish." *Id.* Indeed, denial of benefits solely on the basis of religious conversion demonstrates government disapproval of conversion. Such disapproval violates the Establishment Clause as Justice O'Connor recently emphasized:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch v. *Donnelly*, 104 S.Ct. 1355, 1368 (1984) (O'Connor, J. concurring).

Both Religion Clauses would find abhorrent the State's coercion of Hobbie's religious conscience. Both find Florida's construction of the unemployment insurance statutes repugnant to the religious liberty guaranteed in these clauses. As in the case of a school child forced to

salute the flag against his religious conscience, so in Hobbie's situation do Justice Murphy's words ring true:

> (T)here is before us the right of freedom to believe, freedom to worship one's Maker according to the dictates of one's conscience, a right which the Constitution specifically shelters. Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its farthest reaches.

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624, 646 (1942).

CONCLUSION

The right to convert to the religion of one's own choice has long been considered a cherished First Amendment freedom. To infringe this freedom without good reason, and absent a compelling state interest would deal a crippling blow to religious freedom. State coercion of conscience is always offensive, but especially so when exercised against an individual at the most vulnerable point in her religious experience—in the valley of decision. This case is about the right of a person to be free from state induced coercion concerning the choice of religion. *Sherbert*, *Thomas*, and a long line of First Amendment cases declare that the State cannot deny a benefit on condition that a person violate her religious belief. Accordingly, Appellant Hobbie respectfully requests that this Court overrule the decision of the Florida District Court of Appeals.

Respectfully submitted,

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STATEMENT OF THE CASE

The following exception to the Appellant's Statement of the Case is specified in accordance with Supreme Court Rule 34.2.

Hobbie states: "No attempt was ever made by upper management to accommodate Hobbie's new beliefs, despite her immediate supervisor's statement that their arrangement was working without any problem (Tr. at 59, 78, 79)." (Br. at 6). No such finding was made by the hearing officer. (R. 118-19). Moreover, the record contains evidence that Lawton and Company management officials did meet unsuccessfully with Hobbie and her minister in an attempt to solve the problem. (R.67).

SUMMARY OF ARGUMENT

Florida's Unemployment Compensation Law does not single out for disqualification

persons who have adopted new religious beliefs. The disqualification imposed upon Hobbie would have been imposed regardless of whether her refusal to work her assigned schedule was motivated by religious or by secular interests. The Florida statute under attack was promulgated for a secular purpose and is uniformly applied. Its effect on Hobbie's religious beliefs is an incidental effect of a statute that promotes a legitimate public interest. Neither the design of the statute nor its primary effect prohibit religious practices or promote them. The statute is neutral. It does not violate the free exercise clause or the establishment clause of the first amendment.

Sherbert v. Verner and Thomas v. Review Board are not controlling on this case. Sherbert involved a status of ineligibility that would have prevented Sherbert from receiving benefits so long as

she held her religious beliefs. In contrast, the penalty imposed on Hobbie is far less severe because it is temporary in duration. Thomas also is not controlling because it would have been differently decided in Florida. Although this case can be decided on the basis of the factual differences between this case and Sherbert and Thomas, recent reanalysis of the "least restrictive means to accomplish a compelling state interest" test underlying Sherbert and Thomas suggests that those cases should be overturned.

Finally, if Hobbie is granted benefits, the State of Florida will be required to change its statute to provide special treatment to others who are fired for religiously motivated behavior. Enactment of such an exception to favor religious over secular interests would violate the establishment clause of the first amendment, or at the very least

unduly entangle the State of Florida in the business of deciding cases on the basis of whether the claimant's actions were motivated by sincere religious convictions.

ARGUMENT

I. THE SUPREME COURT HAS JURISDICTION UNDER 28 U.S.C. §1257(2).

Jurisdiction under 28 U.S.C. §1257(2) is provided for review of a decision of the highest court of a state where the validity of a state statute is challenged as repugnant to the United States Constitution and the decision is in its favor.

Florida's district courts of appeal are not intermediate appellate courts. England, Jr., Hunter, and Williams, Jr., Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev. 147 (1980). An appeal of right may be taken to the Florida Supreme Court only when the district court of appeal has

declared invalid a state statute or a provision of the state constitution. Art. V, §3(b)(1), Fla. Const. The Florida Supreme Court's discretionary jurisdiction to review decisions of district courts of appeal is also severely limited. Only those decisions of the district courts which are certified by the district court of appeal as "worthy" of review or which expressly declare a statute valid or expressly construe a constitutional provision or expressly affect a class of constitutional officers or which expressly conflict with a decision of another district court of appeal are reviewable by the Florida Supreme Court. Art. V, §3(b)(3), Fla. Const. A per curiam decision without written opinion meets none of the criteria for review by the Florida Supreme Court. Thus when a district court of appeal renders a per curiam decision without written opinion, the court acts as the highest

court of the State of Florida. See Williams v. Florida, 399 U.S. 78, 80, n.5 (1970).

The second requirement for jurisdiction under 28 U.S.C. §1257(2), a federal constitutional attack on a state statute, is also satisfied in this case. The issue was raised and argued before the state court. (R.3-57). Finally, the decision of the state court allows the statute to stand, but is silent as to the state court's rationale. Such silence, however, is not fatal to the Court's jurisdiction. See Lawrence v. State Tax Commission, 286 U.S. 276, 282-83 (1932). The Supreme Court has jurisdiction pursuant to 28 U.S.C. §1257(2).

II. THE STATUTE INTENDS NO HOSTILITY TOWARD ANY RELIGION OR RELIGION IN GENERAL, IS NEUTRAL AND UNIFORM IN ITS APPLICATION, AND IS A REASONABLE MEANS TO PROMOTE A LEGITIMATE PUBLIC INTEREST. IT DOES NOT VIOLATE THE FIRST AMENDMENT.

A. Sherbert v. Verner and Thomas v. Review Board Do Not Control the Outcome of this Case.

Florida's Unemployment Compensation Law provides two distinct types of penalties which are imposed in statutorily specified circumstances. The first is for failure to meet the eligibility requirements of the statute. Section 443.091, Florida Statutes (1983), in part provides:

443.091. Benefit eligibility conditions.

(1) An unemployed individual shall be eligible to receive benefits with respect to any week only if the division finds that:

(a) He has made a claim for benefits with respect to such week in accordance with such rules as the division may prescribe.

(b) He has registered for work at, and thereafter continued to report at, the division, which shall be responsible for notification of the Florida State Employment Service in accordance with such rules

as the division may prescribe . . . .

(c)

1. He is able to work and is available for work.

(emphasis added).

* * *

Significantly, the ineligibility penalty continues so long as the condition causing the penalty remains in effect. The ineligibility penalty may be considered a status penalty. In contrast, the second type of penalty, disqualification, is imposed for single occurrences. The most common circumstance leading to disqualification is a separation from employment. Section 443.101, Florida Statutes (1983), provides, in part:

443.101. Disqualification for benefits.

An individual shall be disqualified for benefits:

(1) (a) For the week in which he has voluntarily left

his employment without good cause attributable to his employer or in which he has been discharged by his employing unit for misconduct connected with his work, if so found by the division.

1. Disqualification for voluntarily quitting shall continue for the full period of unemployment next ensuing after he has left his work voluntarily without good cause and until such individual has become reemployed and has earned wages equal to or in excess of 17 times his weekly benefit amount; "good cause" as used in this subsection shall include only such cause as is attributable to the employer or which consists of illness or disability of the individual requiring separation from his employment. * * *.

2. Disqualification for being discharged for misconduct connected with his work shall continue for the full period of unemployment next ensuing after having been discharged and until such individual has become reemployed and has

earned wages not less than 17 times his weekly benefit amount and for not more than 52 weeks which immediately follow such week, as determined by the division in each case according to the circumstances in each case or the seriousness of the misconduct, pursuant to rules of the division enacted for determinations of disqualification for benefits for misconduct.

* * *

The disqualification penalty for voluntarily leaving employment without good cause attributable to the employer is the week of leaving and until the individual becomes reemployed and earns 17 times the weekly benefit amount [an amount equal to approximately one-half of the applicant's average weekly wage prior to becoming unemployed. (§443.111(2), Fla. Stat. (1983))]. The penalty for being discharged for misconduct connected with work is the same as for voluntarily leaving employment

except an additional penalty of a specified number of weeks may be added depending on the severity of the offense. §443.101(1)(a)2., Fla. Stat. (1983); Fla. Admin. Code R. 38B-2.17.

When applied to a religion situation, the ineligibility penalty is much more coercive than the disqualification penalty. If a person's religious beliefs make her ineligible for benefits she will forever be ineligible, unless she is willing to forsake her religious beliefs. Such was the case in Sherbert v. Verner, 374 U.S. 398 (1963). Sherbert, a Seventh-Day Adventist, was held ineligible for benefits under South Carolina's unemployment insurance program because she would neither seek nor accept work which conflicted with her Sabbath. Sherbert was determined ineligible for benefits because she was not considered "able to work and . . . available for work." S.C. Code, Tit. 68,

§68-113. Moreover, she would again be held ineligible each time she filed a future claim. In contrast, a fixed disqualification was imposed in Hobbie's case. Once the disqualification is served, Hobbie will be on an equal footing with all other workers, provided she avoids employment that conflicts with her religious beliefs. Obviously the penalty imposed by Florida has a much less coercive effect on Hobbie's religious practices than did South Carolina's statute on Sherbert. As the Court stated in Bowen v. Roy, ___ U.S. ___, 54 U.S.L.W. 4603, 4607 (1986):

> A governmental burden on religious liberty is not inulated from review simply because it is indirect, Thomas v. Review Board, Indiana Employment Security Div., 450 U.S. 707, 717-718 (1981). (citing Sherbert v. Verner, 374 U.S., at 404); but the nature of the burden is relevant to the standard the Government must meet to justify the burden. (emphasis added).

The likelihood that Hobbie will again change her religion while working for an employer who is unable to accommodate the requirements of Hobbie's new religion is so remote that the burden on the State of Florida should be merely to establish that the intent of the statute is completely secular, a fact that Hobbie already concedes. (Br. at 25).

Note 4 of the Court's opinion and the accompanying text in Sherbert suggest that not only was Sherbert held ineligible because she was not available for work, but she was also held disqualified for having refused, without good cause, an offer of suitable work. 374 U.S. at 401-02; S.C. Code, Tit. 68, §68-114(3). Under the applicable Florida statute, Hobbie would have been qualified for benefits because compelling personal reasons, including moral reasons, constitute good cause for refusal of work.

Section 443.101(2), Florida Statutes (1983), in pertinent part provides:

> (a) In determining whether or not any work is suitable for an individual, the division shall consider the degree of risk involved to his health, safety, and morals; his physical fitness and prior training; his experience and prior earnings; his length of unemployment and prospects for securing local work in his customary occupation; and the distance of the available work from his residence.
>
> * * *

Oddly enough an almost identical provision appears in the South Carolina statute:

> (b) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety, and morals; his physical fitness and prior training; his experience and prior earnings; his length of unemployment and prospects for securing local work in his customary occupation; and the distance of the available work from his residence.
>
> * * *

S.C. Code Tit. 68, §68-114(3). The provision evidently was not followed by the

South Carolina Supreme Court. Sherbert v. Verner, 240 S.C. 286, 125 S.E.2d 737, 743-46 (1962). The failure of the South Carolina Supreme Court to follow the neutral course prescribed by its own statute required the Court to strike the statute as hostile toward religion and, therefore, violative of the free exercise clause.

In contrast, the Florida statute applied to hold Hobbie guilty of misconduct because she refused to work her assigned schedule was applied without regard to Hobbie's religious beliefs. Hobbie demanded a permanent change in her schedule which her employer had never agreed to. When she insisted, the employer asked her to resign. She refused and was fired. Florida's statute defines misconduct connected with work as follows:

> MISCONDUCT. -- "Misconduct" includes, but is not limited to,

> the following, which shall not be construed in pari materia with each other:
>
> (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or
>
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

§443.036(24), Fla. Stat. (1983). Since Hobbie refused to work her regularly assigned schedule because of personal reasons and she refused to resign when advised that the employer could not change the schedule, she acted in disregard of her employer's interests. The State of Florida did not single out Hobbie and deny her benefits because of her religious beliefs. Hobbie raised her religious beliefs as a

defense to behavior which otherwise would constitute misconduct. The state rejected Hobbie's defense, because acceptance of it would violate the neutrality of Florida's statute by extending special treatment to Hobbie because of her religious beliefs. It would also require the state to routinely decide in other cases whether individual convictions are religious in nature and sincerely held so as to justify similar special treatment. The prospect of a government body sitting in judgment of religious claims is inimical to the first amendment. Goldman v. Weinberger, ___ U.S. ___, 106 S.Ct. 1310, 1316, n.6 (1986) (STEVENS, J. concurring).

Thomas v. Review Board of Indiana Employment Security, 450 U.S. 707 (1981) also does not control this case. First, if Thomas had arisen in Florida, benefits would have been granted. Thomas's employer unilaterially changed the conditions of

employment. Section 443.101(1), Florida Statutes (1983), provides that "good cause" for quitting employment [which will qualify the individual for benefits] includes that which is "attributable to the employer." Florida decisional law has further defined good cause as follows:

> To voluntarily leave employment for good cause, the cause must be one which would reasonably impel the average able-bodied qualified worker to give up his or her employment.

Uniweld Products, Inc. v. Industrial Relations Commission, 277 So.2d 827 (Fla. 4th DCA 1973). Vazquez v. GFC Builders Corp., 431 So.2d 739 (Fla. 4th DCA 1983), involved a maintenance man who was told when hired that he would not be required to mow lawns. When he was later told he would have to mow lawns, he demanded a pay increase and was fired when he persisted with his refusal to mow the lawns without the pay increase. He then applied for

unemployment compensation. The court directed payment of benefits on the theory that the employer had violated the terms of Vazquez's employment agreement. See also Beard v. State Department of Commerce, 369 So.2d 382 (Fla. 2d DCA 1979) holding that, unless the employee agreed to work any schedule assigned by the employer, the employee who quits because of a unilateral change in schedule causing a substantial hardship to the employee would be entitled to benefits.

Thomas differs most fundamentally from this case in that Thomas's employer changed the status quo and created the conflict between Thomas's job and his religion. Here it was Hobbie who changed her religious beliefs and demanded that her employer conform to her new beliefs. Failing at that and becoming unemployed, she sought unemployment compensation benefits. Hobbie now seeks special treatment by Florida's

unemployment insurance program to allow payment of benefits.

Hobbie concedes (Br. at 19) that it would be unfair to an employer if an employee accepts employment knowing there is a religious conflict then complains about the conflict. See Hildebrand v. Unemployment Ins. Appeals Bd., 140 Cal. Rptr. 151, 566 P.2d 1297 (1977), cert. denied, 434 U.S. 1068 (1978); Flynn v. Maine Employment Sec. Comm'n., 448 A.2d 905 (Me. 1982), cert. denied, 459 U.S. 1114 (1983); DePriest v. Puett, 669 S.W.2d 669 (Tenn. Ct. App. 1984); DePriest v. Bible, 653 S.W.2d 721 (Tenn. Ct. App. 1980); Levold v. Employment Sec. Dept., 604 P.2d 175 (Wash. Ct. App. 1979). If it is unfair for a person to accept employment knowing there is a religious conflict, it is equally unfair for an employee to adopt religious beliefs that conflict with existing employment and expect to continue

the employment without compromising those beliefs. Such an ultimatum from an employee to an employer is an intentional disregard of the employer's interests and constitutes misconduct connected with work under Florida's statute.

B. The Constitutional Standard Expressed in Sherbert and Thomas Is Not Applicable to this Case.

In Sherbert the Court held that the government must show a "compelling state interest" in order to justify "any incidental burden on the free exercise of . . . religion." 374 U.S. at 403. In Thomas, the Court held that the state must show that any regulation burdening religious conduct is the "least restrictive means" to achieve a valid state objective. 450 U.S. at 718. Thomas quoted with approval Wisconsin v. Yoder, 406 U.S. 205, 215 (1972), that "[t]he essence of all that has been said and written on the subject is

that only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."

Yoder involved the direct conflict between Wisconsin's compulsory school attendance law and the Old Order Amish religion's prohibition of formal school education beyond the eighth grade. The Court observed that the state regulation placed the Amish youth in an atmosphere hostile to their religious beliefs and deprived them of the kind of atmosphere necessary for their religious development. The Court refused to allow such coercion absent a compelling governmental need for the regulation. See also United States v. Seeger, 380 U.S. 163, 185 (1965) (conscientious objection to participation in war); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (salute and pledge to flag).

In contrast, where a government regulation merely deprives a religiously affiliated institution of a benefit, but does not impede the institution's religious practices, it has been sustained. Bob Jones University v. United States, 461 U.S. 574, 603-04 (1983). Similarly, a Sunday closing law was upheld despite its negative financial impact on Orthodox Jewish merchants forced to close their businesses on Sunday. The merchants were already prohibited by their religious beliefs from working from nightfall each Friday until nightfall each Saturday. The Court stated:

> Fully recognizing that the alternatives open to appellants and others similarly situated--retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor--may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different

> than when the legislation attempts to make a religious practice itself unlawful.

Braunfeld v. Brown, 366 U.S. 599, 605-06 (1961). See also Hamilton v. Regents of the University of California, 293 U.S. 245 (1934). Compare United States v. Seeger, 380 U.S. 163 (1965) with Johnson v. Robison, 415 U.S. 361 (1974).

Bowen v. Roy, ____ U.S. ____, 54 U.S.L.W. 4603 (1986), again demonstrated the inapplicability of Sherbert and Thomas to cases where government regulations unintentionally affect religious practices in an indirect fashion. Roy, a Native American Indian, applied for assistance under the Aid to Families with Dependent Children program and the Food Stamp program. Roy, however, refused to comply with the requirement that participants must furnish the social security numbers of the members of their household as a condition of receiving benefits. Roy and his wife

contended that obtaining a social security account number for their two-year old daughter, Little Bird of the Snow, would violate their Native American religious beliefs. The Court reacknowledged the "distinction between the freedom of individual belief, which is absolute and the freeedom of individual conduct, which is not absolute." 54 U.S.L.W. at 4605; Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940). Refusing to allow Roy to dictate the conduct of the government's internal procedures the Court held that the social security regulation before it might "confront some applicants for benefits with choices, but in no sense does it affirmatively compel [them], by threat or sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons." 54 U.S.L.W. at 4606. (footnotes omitted).

The Florida statute under review in this case confronts Hobbie with a choice, but it does not force Hobbie to violate her religious beliefs. If Hobbie avoids employment where a religious conflict is present, she will never be forced to choose between unemployment compensation benefits and her religious beliefs. If she chooses to expose herself to such conflicts, she cannot be heard to complain.

> "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." Otten v. Baltimore & Ohio R. Co., 205 F.2d 58, 61 (CA2 1953).

Estate of Thornton v. Calder, ____ U.S. ____, 105 S.Ct. 2914, 2918 (1985).

The Court in Bowen v. Roy announced the following test to determine permissable government interference with religion:

> Absent proof of an intent to discriminate against particular religious beliefs or against

> religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.

54 U.S.L.W. at 4607. The Bowen test protects religious practices from hostile government intrusion, but also recognizes the inevitable minor conflicts between uniformly applied far reaching government programs such as Aid for Families with Dependent Children, Food Stamps, and Unemployment Compensation.

The Florida program meets the Bowen test in that the statute is concededly secular in purpose. It is also applied in a neutral fashion, neither favoring nor penalizing religious interests. Most importantly, the statute promotes a legitimate public interest. As stated by the Florida Legislature:

> **Declaration of public policy. --**

* * *

> Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life.

* * *

> The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police power of the state, for the establishment and maintenance of free public employment offices and for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, subject however, to the specific provisions of this chapter.

§443.021, Fla. Stat. (1983).

Hobbie protests that her actions should not be considered "fault" or "misconduct." She overlooks that those

terms are used in the limited sense of the statute in which they appear. "Fault" as used in Section 443.021, Florida Statutes (1983), and "misconduct" as used in Section 443.101(1)(a)2., Florida Statutes (1983), are limited in application to the employment relationship. Chapter 443, Florida Statutes, is the state unemployment compensation law. It is not a part of the state penal code. Hobbie's "fault" and "misconduct" consist simply of her pursuit of a course of conduct inconsistent with her continued employment. Those actions caused Hobbie to forfeit unemployment compensation during the period of unemployment that followed her separation from Lawton Jewelers.

Finally, the standard expressed in Sherbert and Thomas has no application to this case because those cases "exhibit hostility, not neutrality [toward] religion." Bowen, 54 U.S.L.W. at 4608.

The lack of neutrality in Sherbert and Thomas has been further described as follows:

> In both of those cases changes in work requirements dictated by the employer forced the employees to surrender jobs that they would have preferred to retain rather than accept unemployment compensation. In each case the treatment of the religious objection to the new job requirements as though it were tantamount to a physical impairment that made it impossible for the employee to continue to work under changed circumstances could be viewed as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect.

United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (STEVENS, J., concurring in judgment). In contrast to Sherbert and Thomas, Hobbie's employer did not force her to surrender her job. Hobbie served an ultimatum on her employer, not vice versa. Notwithstanding Hobbie's efforts to downplay the significance of this difference, it is crucial because it distinguishes the cases.

C. Sherbert, Thomas and the Position Taken by Hobbie in this Case Cannot Be Reconciled with the Establishment Clause.

Hobbie acknowledges (Br. at 25) that the standard to determine the constitutionality of legislation under the establishment clause is the three-part test expressed in Lemon v. Kurtzman, 403 U.S. 602 (1971). First, the statute must have a secular legislative purpose. Second, it must have a primary effect that neither advances nor inhibits religion. Third, the state and its administration must avoid excessive entanglement with religion. Walz v. Tax Commission, 397 U.S. 664 (1970). As presently written and applied the Florida statute meets the Lemon test. In order to accommodate Hobbie, however, a proviso must be added to permit payment of benefits to persons who are fired for refusal to work for religious reasons. As amended to accommodate Hobbie, the statute

would clearly violate the establishment clause as interpreted in Lemon. First, although the overall statute would remain secular, the proviso would serve an obvious religious purpose, accommodation of religious beliefs. Second, the primary effect of the proviso would be the advancement of religion by providing more favorable treatment for persons unemployed for religious reasons than for secular reasons. Finally, the proviso would entangle the state with religious claims because prior to granting the benefits of the proviso the state would have to determine whether the person's belief was "religious" and whether it is sincerely held. See Thomas, 450 U.S. at 725-26 (REHNQUIST, J., dissenting); Sherbert, 374 U.S. at 422 (HARLAN, J., dissenting).

Witters v. Washington Department of Services for the Blind, ____ U.S. ____, 106 S.Ct. 748 (1986), relied upon by

Hobbie, exemplifies a government program with a secular purpose and a neutral primary effect. These factors led the Court to overturn the Washington Supreme Court's denial of assistance under the program to a blind student who sought a tuition grant to study theology at a church affilated school. The Court reasoned that the program might incidentally benefit some religious interests, but as a whole the program was neutral and promoted a valid public purpose. In contrast, Hobbie seeks special treatment to accommodate her religious beliefs.

Walz v. Tax Commission, 397 U.S. 664 (1970), also cited by Hobbie provides no support for Hobbie's position because Walz stands for a position opposite hers. The tax exemption granted to the religious institution in Walz was not provided because the institution was sectarian. It was granted in spite of it. Hobbie states that

she wants to be treated like everyone else (Br. at 24), but she overlooks that employees, as a rule, cannot unilaterally dictate to their employers the terms of employment. Although Hobbie denies that she is requesting special treatment because of her religious beliefs, the facts demonstrate otherwise.

The principal reason for resisting any governmental scheme which provides special treatment for religiously motivated behavior has been expressed as follows:

> It is the overriding interest in keeping the government -- whether it be the legislature or the courts -- out of the business of evaluating the relative merits of differing religious claims. The risk that governmental approval of some and disapproval of others will be perceived as favoring one religion over another is an important risk the Establishment Clause was designed to preclude.

United States v. Lee, 455 U.S. at 263, n.2 (STEVENS, J., concurring in the judgment). See also Committee for Public

Education v. Nyquist, 413 U.S. 756, 792-93 (1973); Abington School District v. Schempp, 374 U.S. 203, 226 (1963).

Goldman v. Weinberger, ____ U.S. ____, 106 S.Ct. 1310 (1986), again raised the question whether a religiously based exception could (or must) be made to a regulation secular in purpose and uniform in application. Goldman, an Orthodox Jew and ordained rabbi, was serving on active duty as a captain in the Air Force when he was ordered to stop wearing a yarmulke while indoors. Air Force regulations prohibit the wearing of headgear indoors, except by armed security police while on official business. Goldman challenged the regulation as violating his first amendment freedom to exercise his religious beliefs. In rejecting Goldman's claim the Court stated:

> The Air Force has drawn the line essentially between religious apparel which is visable and

> that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity.

106 S.Ct. at 1314. Justification for the Court's holding was further expressed as follows:

> If exceptions to dress code regulations are to be granted . . . inevitably the decisionmaker's evaluation of the character and sincerity of the requestor's faith -- as well as the probable reaction of the majority to the favored treatment of a member of that faith -- will play a critical part in the decision. For the difference between a turban or a dreadlock on the one hand, and a yarmulke on the other, is not merely a difference in "appearance" -- it is also the difference between a Sikh or a Rastafarian, on the one hand, and an Orthodox Jew on the other. The Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application.

106 S.Ct. at 1316 (footnote omitted). (STEVENS, J., concurring).

In Bowen v. Roy, the Court again rejected a request for a religiously based

exception to a neutral government regulation. The challenged regulation was part of the governmental scheme to provide financial assistance to families with dependent children. The Court refused to grant the exception.

> We are not unmindful of the importance of many government benefits today or of the value of sincerely-held religious beliefs. However, while we do not not believe that no government compulsion is involved, we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition by threat of penal sanctions, for conduct that has religious implications.

54 U.S.L.W. at 4606. The Court addressed the "entanglement" argument as follows:

> [A] policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquires into the genuiness of each religious objection to such condition or restrictions is entitled to substantial deference. Moreover, legitimate interests are implicated

> in the need to avoid any appearance of favoring religious over non-religious applicants.

54 U.S.L.W. at 4607.

The Florida statute and the decision below interpreting it demonstrate that the State of Florida does not wish to become involved in case-by-case inquiries into the genuiness of religious conflicts causing unemployment. The only situation where the Florida law recognizes personal convictions, religious or otherwise, as a basis for an employment decision occurs when a person who is claiming benefits is offered employment that conflicts with personal convictions. See §443.101(2), Fla. Stat. In all other situations the state maintains a neutral position. It is neither hostile toward religious beliefs, nor does it provide favored treatment to religiously motivated persons. The Florida statute violates neither religion clause.

CONCLUSION

The religion clauses of the constitution, with equal force, prohibit governmental assistance to religion and governmental interference with religion. The Florida statute under attack in this case does not foster or impede religious interests. It is secular in purpose, neutral in application and exemplifies the desire of the State of Florida to avoid entanglement in religious conflicts.

The decision of the District Court of Appeal of the Fifth District of Florida is not inconsistent with the laws of the United States and should, therefore, be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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/s/ John D. Maher

No. 85-993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAULA A. HOBBIE, *Appellant*,
v.
UNEMPLOYMENT APPEALS COMMISSION AND
LAWTON AND COMPANY, *Appellees*.

On Appeal From The District Court Of Appeals Of The State Of Florida Fifth District

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I. ARGUMENT

This Reply Brief will direct itself to the extraordinary position taken by the Solicitor General in its *Amicus Curiae* Brief. That position proposes a major departure from this Court's free exercise doctrine precedents and would institute a new test for deciding the constitutionality of governmentally imposed restrictions on religious practices.

A THE SOLICITOR GENERAL ASKS THE COURT TO MAKE A MAJOR DEPARTURE FROM ITS FREE EXERCISE PRECEDENTS. THE TEST PROPOSED IS ITSELF DOCTRINALLY INCONSISTENT; NOT JUSTIFIED BY ANY PROGRAMMATIC INTEREST OF THE UNITED STATES; AND IS LEGALLY FLAWED.

1. The New Test Proposed By The Government Is Internally Inconsistent And Only Partially Responsive To Present Doctrine.

Under present free exercise doctrine, a law which places a substantial burden on a sincerely-held religious belief must pass two hurdles if it is to be applied to the religious claimant: (1) there must be a compelling state interest justifying application of the law in the particular context; and (2) that application must be the least restrictive means (least restrictive of the claimant's religious liberty) of accomplishing the state's compelling purpose.

The Solicitor General Brief attacks this doctrine in two important ways: (1) it offers a change in the level of burden on religious liberty that triggers the two-part test; and (2) it says absolutely nothing about the "compelling state interest/least restrictive means" test. The proposed test allows that neutrally framed, designed and applied government programs do not ordinarily present Free Exercise Clause problems. The point is unexceptionable, since the *Sherbert-Yoder-Thomas*[1] line of

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[1] *Sherbert* v. *Verner*, 374 U.S. 398 (1963), *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981).

cases has always concerned the question of exceptions to otherwise valid, *prima facie* "neutral" state laws.

The entire question is whether *prima facie* neutrality is *sufficient* to deny a free exercise claim. Apparently, the Solicitor General concedes the possibility that indirect and unintentional burdening of religion may also be constitutionally prohibited. The undue attention to facial neutrality, however, begs the question of whether a state policy is truly "neutral" in terms of the liberties protected by the Free Exercise Clause when it ignores religious differences that suggest exceptions to the standard rules of treatment. If "neutrality" means that "likes should be treated alike," it also means that unalikes should be treated *unalike*. True neutrality, as the Solicitor General would seem to agree, sometimes means that religion *must* be treated differently. The truly important part of its Brief, then, is that which seeks to change the circumstances in which "indirect" burdening of religion will be recognized notwithstanding the *facial* neutrality of a law.

The proposed test changes the threshold level of religious burden needed to trigger the two-part test. The current standard holds a cognizable burden on religious liberty to exist when the effect of some governmental policy is to put "substantial pressure" on an adherent to modify his behavior and thereby violate his religious beliefs. *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981). The Solicitor General would impose a much higher initial threshold: Only laws that actually "prohibit" religious exercise "rather direct[ly]" (Br. at 10) or "bear so heavily on an individual's choice as to have virtually the preclusive effect of a direct prohibition" (Br. at 5) even pose Free Exercise Clause difficulty. This change is justified by either the language of the First Amendment or the intentions of the Framers. (The lack of support for this argument is treated at length below).

Once a law is shown to have such a "prohibitory" effect, it is not clear whether the Solicitor General intends that the "compelling interest/least restrictive means" test *then* comes into

play, or whether the violation of the Free Exercise Clause is established. Failure to address this question is one of the major analytic flaws of the proposed test. From the tone of the Brief, it is perhaps fair to presume that the *prima facie* neutrality discussion is designed to *replace* "compelling interest/least restrictive means," but this is nowhere made clear, and is logically inconsistent with the Solicitor General's concession that some "neutral" laws will still violate individual's free exercise rights.

Finally, the test concedes that even where a policy is neutrally formulated and applied, a free exercise claim may be made out if "the state's action is not neutral between religious practices, or between religious and other analogous personal choices." This hedge is similarly incoherent. If a law is facially neutral, what does it mean for it *not* to be neutral between religious practices? If it means that the government policy has a disproportionate impact on one particular belief or group of beliefs *because of their unique religious situation* and not because of the government policy *per se*, the Solicitor General's discussion of *facial* neutrality is *entirely* irrelevant. Yet, if that is not what the exception means, it means nothing at all. Adding further confusion is the idea of neutrality between religious practices "and other personal choices." An additional question arises as to whether the Solicitor General really means to suggest that the First Amendment provides no greater protection for religious choices than for nonreligious personal choices, and that religious and nonreligious choices must always be treated as "likes."

2. The Proposed Test Is Not Justified By Any Significant Interest Of The United States.

While the Solictor General might be thought to have a continuing interest in the proper interpretation of all provisions in the Constitution, its *programmatic* interest is in the protection of federal programs from constitutional challenges. These challenges come in the form of Free Exercise Clause claims for exemption from or modification of governmental regulations *in*

a particular case (as, for example, were at issue last term in *Bowen* v. *Roy*, 54 U.S.L.W. 4603 (1986)) and *Goldman* v. *Weinberger*, 106 S.Ct. 1310 (1986) and, more frequently, Establishment Clause challenges to entire government programs or federal statutes (*See, e.g., Aguilar* v. *Felton*, 105 S.Ct. 3232 (1986); *Bender* v. *Williamsport*, 106 S.Ct. 1326 (1986); *Corporation of the Presiding Bishop of the Church of Latter-Day Saints* v. *Amos*, 594 F. Supp. 791 (D. Utah 1986), *review granted* 55 U.S.L.W. 3307 (U.S. Nov. 3, 1986) (Nos. 86-179, and 86-401). For obvious reasons, the latter is the greater interest: free exercise challenges ask for narrow, if irritating, exceptions to the rules, while establishment challenges seek to wipe out the rules and programs themselves.

The Solicitor General's Brief seems to appeal to the latter interest on the theory that narrowing the Free Exercise Clause will permit more government programs to survive Establishment Clause challenges. (Br. 19-25) If this is the primary interest of the United States, its Brief ill-serves that purpose for two reasons.

First, it is illogical to conclude that a narrowing of the Free Exercise Clause will achieve a broader scope for permissible state accommodations of religion free from Establishment Clause challenge. The Brief correctly assumes that there is a middle ground "between" the prohibitions of the two clauses. But even on this theory, any broadening of the middle ground of permissible accommodation comes only at the expense of what otherwise would have been thought to be constitutionally *required* accommodation. There is no sound reason to believe that expanding the "breathing space" in one direction will serve to expand it in the other direction as well. Such a result is *entirely* dependent on the Court's willingness to adjust its Establishment Clause analysis *as well as* its free exercise analysis. It cannot be argued in support of the position taken in the Brief that it serves to lessen the circumstances in which government programs are thought to run afoul of the Establishment Clause.

Second, the Solicitor General's Brief may, ironically, work in opposition to such a purpose. In several cases in which government policies have been upheld against Establishment Clause challenge, it has been important to the Court's decision that the government policy at issue was, if not actually compelled by the Free Exercise Clause, strongly counselled by free exercise principles. It is interesting that the only majority opinion cited by the Solicitor General in support of the proposition that a conflict exists between the Free Exercise and Establishment Clauses is *Walz* v. *Tax Commission*, 397 U.S. 664 (1970).[2] In *Walz*, it was important if not crucial to the Supreme Court's upholding the constitutionality of church property tax exemptions that the denial of such exemptions would create serious free exercise and entanglement problems. 397 U.S. at 674. *See also Katcoff* v. *Marsh*, 755 F.2d 223, 224, 237 (2d Cir. 1985) (military chaplaincy does not violate Establishment Clause because it is a permissible means of reaching what may be a constitutionally *required* end). Indeed, it is a powerful response to the "strict separation" argument that such a position would require separation even at the expense of disparate

[2] The other authorities include Justice Rehnquist's dissent in *Thomas* v. *Review Board*, 450 U.S. 707, 726, and Justice Stewart's dissent in *Sherbert* v. *Verner*, 374 U.S. 398, 414. Both of these dissents attack the Court's free exercise holdings because they conflicted with the Court's Establishment Clause analysis. But both opinions also vigorously maintained that the Establishment Clause analysis was wrong. To the extent that both of these dissents were prompted by the anomly of such a "conflict" (the point for which they are cited here), it is important to note that the conflict could have been resolved by a less "wooden" or "sterile" interpretation of the Establishment Clause. *See, Thomas*, 450 U.S. at 727 and *Sherbert* 374 U.S. at 414. This would also resolve the conflict on grounds satisfactory to the majority of the commentators cited in footnotes 9 and 10 of the Solicitor General's Brief.

The citation to Justice White's dissent in *Widmar* v. *Vincent*, 454 U.S. 263 (1981) is truly astonishing. Not only was White the sole dissenter in that case, but the government has quite properly urged the application of *Widmar* in other contexts. See Brief for the United States as *Amicus Curiae* in *Bender* v. *Williamsport Area School District*, 106 S.Ct. 1326 (1986). Justice White himself is now apparently willing to follow *Widmar* in analogous circumstances, in accordance with the Solicitor General's argument in *Bender*. 106 S.Ct. 1326 at pages 1336-1338. (Burger, C.J., dissenting).

and discriminatory treatment of religious individuals. This is essentially an argument that takes advantage of the supposed "conflict" between the two clauses as a way of defending a governmental program's validity. Positions akin to this were urged by the government in *Witters* v. *Washington Commission for the Blind*, 106 S.Ct. 748 (1986) and *Aguilar* v. *Felton*, *supra*. It took *precisely* such a position in its *amicus curiae* brief in *Thornton* v. *Caldor, Inc.*, 105 S.Ct. 2914 at ____, ("The Establishment Clause cannot be taken to prohibit Connecticut from extending to the private workplace the requirement of making the very sort of accommodation to Sabbath observances that the Free Exercise Clause was found to require of South Carolina in *Sherbert*") and would do well to take such an approach in the upcoming *Amos*, *supra*, cases. In sum, a broad free exercise right serves as a powerful buttress to the constitutionality of a wide array of government programs against Establishment Clause challenge.[3]

It is therefore perplexing that the Solicitor General advances an argument that runs precisely counter to this reasoning. At page 13 of the Brief, an argument is made to support the proposition that "there is a clear difference between interfering with a person's ability to follow his religious beliefs and not providing him with funds to make such activity more comfortable or rewarding." Regardless of one's position on various Administration programs, such an argument undermines the very rationale for several Administration programs, such as the education "voucher" plans. The premise underlying such plans is that the denial of some form of "subsidization" burdens

[3] In a rather perverse reversal of field, the Solicitor General's Brief employs language taken *in haec verba* from its *Caldor* Brief to make the exact reverse of the point made in *Caldor*. *Compare The Solicitor General's Caldor* brief at 15, n.19 with its Brief here at 25, n.12. Whereas in *Caldor*, the possibility of a conflict between two Religion Clauses was used in support of the argument that Connecticut's law did not violate the Establishment Clause, in the Solicitor General's Brief the argument is impressed into the service of a claim that the Free Exercise Clause should be narrowed in order to avert any conflict.

choice, and that when the burdened choice is one of private relgious education as opposed to state-run education, an important interest in religious liberty is compromised. Voucher supporters often argue that equivalent subsidization of alternatives to state-run schools is constitutionally *required*.

The form and, equally importantly, the tone of the argument made in the Solicitor General's Brief (Br. 13), belittling the nature of the religious liberty interests involved, could have the effect not of broadening the *tertium quid* but only of shifting it: fewer free exercise claims would be recognized, accommodations would be thought permissible where they previously had been thought required, and a greater number of government programs might even be thought unconstitutional on Establishment Clause grounds, where they previously had been regarded as permissible accommodations.

3. The Position Advanced By The Solicitor General Threatens To Undermine Religious Liberty.

Concern with the Solicitor General's position is not limited to undermining the defensibility of government programs that promote religious liberty, but also involves the narrowing of circumstances in which individuals seek exemption on religious grounds from otherwise valid statutes. The Solicitor General's Brief fails to acknowledge the extent to which its proposed free exercise test would require overruling the Court's most significant free exercise precedents and completely discard settled doctrine. Of greatest concern, however, is that this "interest" of the United States seems not to have been weighed against the countervailing interest of the United States (and this Administration, in particular) in a continued commitment to the principle of religious liberty. Such a weighing would counsel against the position urged in the Solicitor General's Brief.

1. The whole premise of the new test proposed by the Solicitor General is that religious freedom is less impaired when it is impaired inadvertently or indirectly. From the perspective of the religious adherent (the perspective con-

templated by the Bill of Rights), this clearly makes no sense. The point that the Brief seems to be making is that religious freedom is *less likely in fact* to have been violated in those circumstances when the government statute is both neutrally *framed* (a term which encompasses both neutral wording and neutral intent) and even-handedly applied. This, however, is not a doctrinal point but a factual question: has the government policy indeed placed "substantial pressure on an adherent to modify his behavior and violate his [religious] beliefs . . ."? *Thomas*, 450 U.S. at 717-718. One could argue that *Thomas* and *Sherbert* should not be read so broadly a to say that such "substantial pressure" will *always* be present in these types of cases or that there is a *conclusive* presumption of unconstitutional effect. One could further argue that, as a *factual* matter, no such pressure has been shown to exist in this case, and that a remand is necessary to develop the record which might support or negate such a conclusion.[4] But the Court in *Thomas* was surely correct in noting that whether such compulsion exists has nothing to do with whether it occurs as the result of direct or indirect governmental actions. While it may well be the case that a statute which literally singles out religion for adverse disparate treatment is more likely to violate the Free Exercise Clause rights of individuals, it is still the case that government may infringe the free exercise of religion by acts of omission as well as acts of commission.

A closely related shortcoming of the Solicitor General's Brief is its willingness to pretend that denial of a benefit to which others similarly situated are entitled does not impose a burden

[4] It would seem that the Solicitor General's real interest in these cases is in not having the government's facially neutral policy *presumed* to violate an individual's free exercise rights. The question is whether Hobbie, Sherbert or Thomas could *prove* that the government policy of not recognizing any "personal" reasons as adequate grounds for quitting *of its own force* put substantial pressure on them to modify their behavior and violate their religious beliefs. Intuitively, such proof is unlikely; the real "pressure" came from the actions of the employer. Yet, in both *Sherbert* and *Thomas*, the claimant would rather quit than violate the tenet.

on the individual denied the benefits. This is thought to create problems only of equality, and not of freedom. (Br. at 14) But such a facile distinction cannot be made; the Free Exercise Clause must be construed *at minimum* to encompass a right to equal civil rights for religious persons. *See, e.g., McDaniel* v. *Paty*, 435 U.S. 618 (1978).

The key questions are: (1) whether facially "neutral" laws necessarily result in equal treatment for religious persons, given the sometimes conflicting requirements of their religion; and (2) whether access to general public benefits is a civil entitlement.

The first question is far more "nuanced" (*compare* Br. at 3) than the Brief recognizes. The word "neutral," standing by itself, is vacuous. What is it with respect to which government is supposed to be neutral? Without addressing this question, "neutral" becomes merely a conclusory label. *Sherbert* emphasized the requirement of neutrality "in the face of religious differences." 374 U.S. at 409. This seems correct. In Free Exercise Clause cases the thing with respect to which government must be "neutral" is *freedom of religious exercise*.

The second question—whether access to general benefits is an "entitlement"—is troubling for one reason only: It seems to imply an endorsement of the legitimacy of the Welfare State. Of course, this is not actually the case. All that is required is recognition that, for better or worse, in the age of the modern Welfare State, many governmental benefits are quasi-entitlements, the deprivation of which on account of religious *belief or exercise* is the functional equivalent of imposing that burden directly.[5]

To summarize: Other than as an empirical proposition, whether a government policy results in a burden on religious

[5] The Solicitor General's heavy reliance on *Johnson* v. *Robison*, 415 U.S. 361 (1974), (Br. at 14-15) is misplaced for the obvious reason that the claimant therein was not similarly situated to others claiming veterans benefits—in that he had not participated in military service.

liberty has very little to do with whether the policy produces that result directly or indirectly, intentionally or unintentionally. Whether the government policy is in fact "neutral" depends far less on the way it is written than on whether it produces disparate effects on the freedom of religious exercise. The Free Exercise Clause requires "neutrality in the face of religious differences." The Brief's halting departure from this principle is cause for concern.

2. Where a religious claimant can establish by proof that a government policy really has put substantial pressure on him to modify his behavior and thereby violate his sincerely-held religious beliefs, one may legitimately ask why the government *ought not* to be required to show a "compelling" reason for continuing to apply such substantial pressure on the religious adherent. The relatively few and idiosyncratic claims presented do not threaten to destroy entire government programs and, where they would so threaten, the government arguably has a compelling interest sufficient to overcome the Free Exercise claim, so long as its program is well-designed. In short, present Free Exercise doctrine scarcely places unreasonable demands on government; where religious claims *would* impose unreasonable demands, *that* is the government's defense. Broad protection of religious exercise imposes minimal costs on government, and produces enormous benefits to the liberties of religious persons and groups. Given the Administration's commitment to religious liberty, any weighing of the various interests at stake counsels against so radical a constriction of free exercise rights as is proposed in the Solicitor General's Brief.

If no Free Exercise Clause violation exists unless, as urged by the Solicitor General, the effect of the government action is virtually to *shut down* a religious belief, religious practice, or religious community, the protections of that Clause are quite narrow indeed. Highly intrusive governmental regulations could be imposed on religious institutions without regard to their impact on the autonomy of those institutions, so long as their religious practices were not out-and-out prohibited, or

very nearly so. The identity of such institutions could be threatened, or at the very least, subject to the "optional accommodation" of government, varying with the degree of sensitivity to religious concerns shown by varying administrations of federal, state and local governments. The Solicitor General appears not to have considered the full implications of the position proposed.

3. It is of no small concern that the Solicitor General has understated the degree to which this new theory would require overruling the Court's major Free Exercise Clause precedents. It argues that the new test "harmonizes the general course of the Court's free exercise clause decisions" (Br. 5), but downplays the fact that the proposed position would require (1) *abandoning* completely the Court's well-settled doctrine in this area, and (2) *overruling* the Court's most significant free exercise decisions. The Brief refers to Appellant's Brief as representing the "extreme theory" neglecting to note that this is by and large the theory advanced in *Sherbert* and *Thomas*, and in *Wisconsin* v. *Yoder* as well.[6] While indeed the Court might have decided *Sherbert* on narrower grounds than it in fact did, certainly it is of some consequence that the limiting rationale was in no way suggested by the Court's opinion. Moreover, the Solicitor General's brief at the same point, tacitly suggests that those same factual features applied in *Thomas* v. *Review Board* as well. Indeed, of course, they did

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[6] The Solicitor General offers only the most cursory attention to *Yoder*, (Br. at 11, n.7), stating simply that whether a neutrally-written "prohibitory" law could ever violate the Free Exercise Clause is not presented by the *Hobbie* case. This is, of course true, but it is not urging a focused position concerning the application of the Court's precedents to a particular situation. It is proposing that Free Exercise Clause claims be subjected to a new test. It would seem incumbent to address the ramifications of that new test for one of the Court's most important Free Exercise Clause precedents. The statute at issue in *Yoder* was not clearly "prohibitory" under the terms of the proposed test; the Amish could continue to exercise their religious belief for a cost of only $5 a piece. *See* 406 U.S. at 208. It is perhaps revealing that the new test is as opaque as not to be capable of a clear application in one of the Court's landmark free exercise cases.

not; the very existence of this factual difference between *Sherbert* and *Thomas* was what permitted Justice Rehnquist to dissent even on the assumption that *Sherbert* was correctly decided. To state the matter forthrightly: to adopt the position proposed would necessarily mean overruling *Thomas* v. *Review Board* (decided just five years ago by a vote of 8-1), disapproving the rationale in *Sherbert* in favor of a fact-bound basis for that holding, and placing the continued validity of *Wisconsin* v. *Yoder* in a state of considerable uncertainty.

4. The Solicitor General Has Departed From The Jurisprudential Hallmarks Of This Administration: Judicial Restraint And A Commitment To The Careful Examination Of The Constitutional Text.

It is too late in the day to read the Free Exercise Clause as permitting laws which substantially impair religious exercise, so long as they do not prohibit it. Only if the historical argument is clear and convincing that the Framers intended such an extreme position would the Solicitor General be justified in proposing such a radical reconstitution of present case law. The historical argument does not begin to approach such a level. Instead, the Brief (7-8) advances a rather curious textual argument. It attaches significance to the differences between the modifying words preceding each of the First Amendment's prohibitions. The conclusion is then offered, without supporting historical analysis, that this linguistic difference reflects a considered judgment by the Amendment's adopters to accord a different, lesser degree of constitutional protection to religious exercise than freedom of speech or the press. Such an approach does not do justice to any consistent "originalist" jurisprudence.

The central inquiry in constitutional interpretation is the meaning of the text. Under a jurisprudence of original intent, the meaning of the words used is best determined by looking to the meaning that was accorded those words by the persons who wrote and adopted the provision in question. That is, the meaning of the language is informed by the historically demonstrable intentions of the Framers. The approach of the Solicitor General is precisely backwards: an examination of the dictionary definition of the words (from a 1979 dictionary)[7] produces a view that is then read back into history *as if* it reflected the intentions of the Framers.

In the first place, this argument reaches the truly extraordinary conclusion that the Founding Fathers actually intended to give the free exercise of religion less protection from government interference than freedom of speech and of press. This defies common sense, as well as much of what we know about the high esteem in which the Framers held freedom of religion. Secondly, the legislative history cited by the Brief does not

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[7] Even if one could accept the somewhat strained hypothesis that the Framers chose the different words "abridging" and "prohibiting" to express different levels of intended constitutional protection, one would want to consider whether the words chosen by the Framers at the time had the degree of distinction in meaning that they have today or were taken as being more closely synonymous. A study of the meaning of these words recorded in Noah Webster's original 1828 dictionary reveals that the Solicitor General has engaged in seemingly anachronistic lexicography.

"Abridge" had, as one of its meanings, a sense much closer to "prohibit" than it does today. Webster offered four definitions: "1. To make shorter; . . . to contract by using fewer words, yet retaining the sense in substance. . . ; 2. To lessen; to diminish. . . ; 3. *To deprive; to cut off from;* . . . 4. *In Algebra, to reduce a compound quantity.* . . ." (emphasis added).

"Prohibit" had, as one of its primary meanings, a sense much closer to "abridge" than the more absolute meaning it has acquired today. Webster offered two basic definitions: "1. To forbid; to interdict by authority. . . ; 2. *To hinder; to debar; to prevent; to preclude.* . . ." (emphasis added).

Interestingly, in the principle form, the words in 1828 were very nearly synonymous, in some respects. "Abridging" was defined as "shortening; lessening; depriving; debarring"; "prohibiting" was defined as "forbidding; interdicting; debarring." ("Debarring" was defined as "preventing from approach, entrance, or enjoyment.")

This is not to argue that the two words had identical meanings for the Framers as they drafted what became the First Amendment. It is merely to point out that one may conclude a great many things from studying the dictionary definitions of words. One thing that cannot fairly be concluded is that the Framers necessarily intended, by using the word "prohibiting" at one point and "abridging" a little on, to have chosen language with the more distinct and different meanings those words were to acquire by 1979.

bear out this conclusion, and is not supported by the authorities on which the Solicitor General relies. The Brief (9-10) makes the observation that the Framers were motivated by concerns of religious persecution and intolerance. This is certainly a correct statement, but it says nothing about the scope of the constitutional provision adopted to address this problem. The only actual "legislative history" cited is Madison's statement. The only other historical source offered is Jefferson's Bill for Religious Liberty. Neither source supports the point. Madison's statement is treated as if it referred half to the Establishment Clause and half to the Free Exercise Clause. It is not at all clear that Madison's reported remarks were not solely in response to his colleague's inquiry as to the meaning of the Establishment Clause alone. (At least this is how this history has been treated in earlier submissions by the Solicitor General, see Brief *Amicus Curiae* in *Bender* v. *Williamsport*, 106 S.Ct. 1326 at 15.)

The reference to the Court's reliance on Jefferson's Bill is even more problematic. In the first place, the Court's reliance on various state approaches to religious liberty as explicating the meaning of the federal Bill of Rights is suspect. At the very least, a state's view is not determinative of the meaning of the federal constitutional provision. (Interestingly, Virginia's proposal for a federal constitutional amendment concerning religious liberty differed both from its state constitutional provision and from the Bill for Religious Liberty.) Second, the use to which the Solicitor General's Brief puts the Court's treatment of Jefferson's Bill is highly selective. The Court has also cited the portion of Jefferson's Bill which declared that "'it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.'" *Reynolds* v. *United States*, 98 U.S. 145, 163 (1878).

It is precisely the lack of clarity in the historical record that preludes a cut-and-dried argument from original intent, as even the most solidly orginalist writers concede. *Thomas* v.

Review Board, 450 U.S. at 721-722 (Rhenquist, J., dissenting) ("Because those who drafted and adopted the First Amendment could not have foreseen either the growth of social welfare legislation or the incorporation of the First Amendment into the Fourteenth Amendment, we simply do not know how they would view the scope of the two clauses.") M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* at 19 (1978). The argument in the Solicitor General's Brief in this case is simply unsupported by the historical evidence.

This does not mean that the Brief's textual argument is unsupportable. The question then becomes whether the language of the Free Exercise Clause should be read as limited only to prohibitory government acts, absent historical warrants for such a reading. Such view would, of course, be unprecedented. More to the point, such a view proposes a major contraction in the protection presently afforded religious liberty, as discussed above. Accordingly, such a position should not lightly be proposed, even were its historical defensibility better established.

5. The Religion Clauses Need Not Work At Cross-Purposes With One Another.

Though the exact scope to be given each clause may not be precisely illuminated by the original intentions of the Framers, the one inference that is most clear from the history is that the Framers had no intention of writing a constitutional provision that was self-contradictory, in theory or in application. If any revision of the Court's doctrine is to be proposed, in order to bring it more in line with the original intent of the Framers, it should be along these lines: The Solicitor General should consider attacking the problem of the supposed "tension" or "conflict" between the two clauses. As noted above, free exercise principles buttress the constitutionality of government accommodations of religion against establishment challenges. Conversely, the more selective the governmental accommodation, and the less it seems dictated by considerations of protecting the *constitutional* right to the free exercise of religion, the

closer it comes to posing genuine Establishment Clause problems. The two clauses seem to work together more often than they pull in opposite directions.

This would have been the better approach for the Solicitor General to take, and one that need not cut back on the principle of religious liberty: Where the government policy is *prima facie* neutral, the burden lies with the religious claimant to demonstrate, not simply assert, that the ~~policy nonetheless~~ puts "substantial pressure" on him to violate his religion.

It is therefore disappointing to see the Solicitor General cite the Court's *Engle* v. *Vitale*, 370 U.S. 421 (1962) dictum approvingly (Br. at 11): "'[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of *direct governmental compulsion* and is violated by the enactment of laws which establish an official religion whether those laws operate *directly to coerce* non-observing individuals or not.'" The better argument to make is that this dictum (and it is only that) misses the mark, and that the following principle should be followed: where the government policy is *prima facie* neutral, the burden lies with the person challenging the statute, on *either* free exercise or establishment grounds to demonstrate (not simply assert) that the policy *nonetheless puts "substantial pressure" on him to alter his behavior*, and thereby violate his religious beliefs (free exercise), or adopt religious practices he otherwise would not have adopted, but for the governmental pressure (establishment).

II. CONCLUSION

The new free exercise test proposed by the Solicitor General in hostile hands could be transformed into selective accommodation with only majority religious practices accorded the protection of the Free Exercise Clause. It would seriously contract the existing safeguards and denigrate those liberties safeguarded by the First Amendment. As a consequence, the test proposed by the Solicitor General should be rejected and, as requested, the matter on appeal be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's Reply Brief has been furnished by U.S. Mail to Joseph W. Carvin, Esquire, Alley and Alley, Chartered, Post Office Box 1427, Tampa, Florida 33601, counsel for Lawton and Company, and Richrd S. Cortez, Esquire, Ashley Building, Suite 221, 1321 Executive Center Drive East, Tallahassee, Florida, counsel for Unemployment Appeals Commission. Additionally, copies of the Reply have also been furnished to each *Amicus Curiae* named in this case.

Walter E. Carson, Esq.

No. 85-993

In the Supreme Court of the United States

OCTOBER TERM, 1986

PAULA A. HOBBIE, APPELLANT

v.

UNEMPLOYMENT APPEALS COMMISSION, ET AL.

ON APPEAL FROM THE DISTRICT COURT OF APPEALS OF THE STATE OF FLORIDA, FIFTH DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

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35pp

QUESTION PRESENTED

Whether it violates the free exercise clause for a state agency to deny unemployment benefits to someone who loses her job because she refuses to work certain scheduled hours due to sincerely held religious beliefs adopted after she became an employee.

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INTEREST OF THE UNITED STATES

This case involves the validity of a Florida statute which has been interpreted in this case to deny unemployment benefits to someone who lost her job because she refused to work certain scheduled hours due to sincerely held religious beliefs adopted after she became an employee.

The United States has a great interest in the scope given the free exercise clause and the establishment clause of the First Amendment, both of which are at issue here. Questions similar to those in this case were raised last Term in *Bowen* v. *Roy*, No. 84-780 (June 11, 1986); *Goldman* v. *Weinberger*, No. 84-

1097 (Mar. 25, 1986); and *Bender* v. *Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), in which the United States participated as a party or as an amicus. The United States has participated in cases involving the religion clauses from earlier terms as well, either as a party (*e.g.*, *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, No. 83-1935 (Apr. 23, 1985); *United States* v. *Lee*, 455 U.S. 252 (1982); *Harris* v. *McRae*, 448 U.S. 297 (1980); *Tilton* v. *Richardson*, 403 U.S. 672 (1971)) or as an amicus (*e.g.*, *Estate of Thornton* v. *Caldor, Inc.*, No. 83-1158 (June 26, 1985); *Wallace* v. *Jaffree*, No. 83-812 (June 4, 1985)).

STATEMENT

In April 1984, after two-and-one-half years as a trainee and assistant manager of a retail jewelry store, appellant Paula Hobbie informed her manager that she was being baptised into the Seventh-Day Adventist Church and, for religious reasons, would no longer be able to work between sundown Friday and sundown Saturday. Notwithstanding the employer's policy prohibiting management personnel from taking Friday evenings and Saturdays as permanent days-off,[1] the store manager worked out an arrangement with appellant whereby she agreed to work evenings and Sundays and he agreed to work for her whenever she was scheduled to work on a Friday evening or a Saturday. This exchange of shifts occurred several times, though on other occasions appellant worked her scheduled Friday night or Saturday shift (J.A. 2).

[1] The Unemployment Appeals Commission noted in its decision that these are traditionally the heaviest retail sales days (J.A. 2).

On May 28, 1984, after a meeting with appellant and her minister, the general manager advised appellant that she could not be allowed special scheduling privileges. On June 1, 1984, appellant was told that she would either work her scheduled shifts or the company would accept her resignation. When she refused to resign, appellant's employment was terminated.

On June 4, 1984, appellant filed a claim for unemployment compensation with the Florida Department of Labor and Employment Security. Florida law provides (Fla. Stat. Ann. § 443.101 (West Supp. 1986)):

> An individual shall be disqualified for benefits:
>
> (1)(a) For the week in which he has voluntarily left his employment without good cause attributable to his employer or in which he has been discharged by his employing unit for misconduct connected with his work * * *.

Appellant's employer contested the payment of benefits on the ground that appellant had been discharged for misconduct connected with her work,[2] and a claims

[2] Fla. Stat. Ann. § 443.036(24) (West 1981) provides:

> "Misconduct" includes, but is not limited to, the following, which shall not be construed in pari materia with each other:
>
> (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or
>
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

examiner of the Bureau of Unemployment Compensation denied her claim for benefits. On appeal of that determination, following a hearing before a referee, appellee Unemployment Appeals Commission affirmed the denial of the claims (J.A. 5), approving the two-page opinion of the referee holding that appellant's refusal to work scheduled shifts was misconduct connected with her work (J.A. 1-3).

Appellant appealed the Commission's order to the Florida Fifth District Court of Appeals, and that court issued an order stating "PER CURIAM. AFFIRMED." Because, under Florida law, a per curiam affirmance without an opinion cannot be appealed to the state supreme court, appellant appealed directly to this Court.[3]

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant seeks reversal of a judicial order, affirming without opinion an administrative decision which did not discuss the free exercise issue presented here for review. Hers is the extreme claim that any state action having the effect of disadvantaging an individual's choice to adhere to a religious practice must meet the high standards of necessity required for actions which would otherwise violate the Free Exercise Clause. The text and history of the clause as

[3] See Fla. R. App. P. 9.030(a)(2)(A). There was an initial dispute among the parties about whether an appeal was proper under 28 U.S.C. 1257(2). See Mot. to Dis. or Aff. 7-11. The parties now agree that an appeal is proper. Br. for Appellant 8-12; Br. for Appellee 4-6. See *Sherbert* v. *Verner*, 371 U.S. 938 (1962) (noting probable jurisdiction); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 112 (1968 ed.) (appeal lies under 28 U.S.C. 1257(2) even though state court is not explicit in rejection of constitutional claim raised).

well as the general course of this Court's decisions, far from supporting such a theory, suggest a more nuanced approach. Nor should this Court's decision in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), be taken to compel acceptance of appellant's contention.

The text of the free exercise clause, when compared to the speech, press, assembly, petition, and establishment clauses, appears to be directed at precluding a narrower and more focused kind of state action. And the Court's decisions dealing with claims to subsidies for constitutionally protected choices support this inference. Accordingly, we suggest that free exercise claims should generally not be entertained when the state's actions, rather than prohibiting or directly seeking to discourage a religious practice, have an indirect and unintended disadvantaging impact on an individual's choice to engage in a particular religious practice. Even in such cases of indirect disadvantaging, a free exercise claim may be made out, however, if (a) the state's action is not neutral between religious practices, or between religious and other analogous personal choices, or (b) the action bears so heavily on an individual's choice as to have virtually the preclusive effect of a direct prohibition.

This formulation not only harmonizes the general course of the Court's free exercise clause decisions, but also makes the best sense of the relation of that clause to the establishment clause. By recognizing some breathing space for the optional accommodation of religious practice by the state, there is avoided the situation that a particular accommodation is either required by the free exercise clause or forbidden by the establishment clause, with no *tertium quid* in between. This breathing space is desirable for a number of reasons, not the least of which is the danger—

if the two clauses are brought into contact—that a particular state accommodation might appear at different times to be both required and prohibited.

The lack of any explicit attention to these or any constitutional issues in the decisions below denying appellant's claim merits remand by this Court. The state's scheme may, for instance, lack the neutrality which is a necessary if not a sufficient condition for the validity of its denial of benefits here. Nor is it clear what the impact and duration of the denial was in this particular case, a factor which may bear on appellant's constitutional claim even if the state's scheme satisfies the test of neutrality.

ARGUMENT

THE RECORD OFFERS NO SUFFICIENT BASIS ON WHICH TO DETERMINE WHETHER OR NOT APPELLEE HAS PROHIBITED THE FREE EXERCISE OF RELIGION

This case comes to the Court on a record containing virtually no consideration of the free exercise issue which it presents. While appellant's counsel briefly raised the issue at the hearing before the referee of the Unemployment Appeals Commission and both parties briefed the issue before the Florida appellate court, neither the referee's opinion, which was affirmed by order of the commission, nor the state appellate court's per curiam affirmance, touches upon it. As a result, this Court is invited to determine whether appellee has violated appellant's right to free exercise of religion by reference to a record which lacks the critical facts bearing on this issue.[4]

[4] There is nothing in the record, for example, about the way in which Fla. Stat. Ann. § 443.101 (West 1981 & Supp. 1986), and especially the language disqualifying applicants when discharged for work-related misconduct, has been applied in other contexts. There has been no argument and no judicial discussion about whether it has been applied in a nondiscriminatory manner to religious as opposed to nonreligious conduct, or to the conduct of some religions as opposed to others. Nor has there been consideration of the nature and amount of the benefits being denied, of the permanent or temporary duration of the denial, or of any additional consequences attendant to the refusal of benefits. See pages 26-28, *infra*.

A. The Denial Of Benefits Under A Facially Neutral Statute, Without More, Is Not A Prohibition Of The Free Exercise Of Religion

The thrust of appellant's argument—a necessary thrust given the state of the record—is that the state may *never*, absent a compelling interest and no other way of advancing it, deny receipt of benefits under a facially neutral statute where the applicant is ineligible because of performance (or non-performance) of an act prescribed (or proscribed) by his religion. We submit that this theory of the free exercise clause is inconsistent with the language and origins of the clause, and with this Court's decisions under it.

1. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

To begin with, it is significant that it is not laws "respecting" the free exercise of religion or "abridging" it that are proscribed, but only those "prohibiting" it. And this is a considerably narrower proscription. Abridging means "[t]o reduce or contract" (*Black's Law Dictionary* 8 (5th ed. 1979)) and re-

specting means only "with regard to" (*Webster's Third New International Dictionary* 1934 (1976 ed.)); but prohibit means "[t]o forbid by law; to prevent" (*Black's Law Dictionary* 1091 (5th ed. 1979)).[5] The contrast between the use of "prohibiting" in the free exercise clause and "respecting" or "abridging" elsewhere in the First Amendment indicates that the Framers did not propose identical limits on Congress's authority to enact laws. Thus, while the Framers may have been concerned with a relatively broader array of laws regarding the establishment of religion and assembly and speech, they were troubled in the free exercise clause only with prohibitory laws that forbid or prevent the practice of religion. Consequently, so long as a law does not with relative directness proscribe a religious practice or require behavior contrary to a religious belief, it is not in evident conflict with the express terms of the free exercise clause.

The origins of the clause bear this out. "No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." *Everson* v. *Board of Education*, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting). During the early days of the colonies, religious believers were often persecuted and forced to engage in practices which violated their beliefs. Laws were enacted requiring attendance at approved services, expulsion of religious nonconform-

[5] We do not question that "free exercise" means more than mere advocacy or belief; the phrase itself denotes action or activity. Furthermore, if the free exercise of religion were only a right to express religious beliefs, then the clause would be mere surplusage, since that right is already protected by the right to assemble, speak, and publish. See *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981).

ists, support for the established church, and imprisonment of those who preached unpopular doctrine. See C. Antieau, A. Downey & E. Roberts, *Freedom From Federal Establishment* 16-29 (1964); L. Pfeffer, *Church, State, and Freedom* 71-90 (1964). "Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated." *Everson* v. *Board of Education*, 330 U.S. at 10 (footnote omitted). It was an abhorrence of such conduct which gave birth to the religion clauses of the First Amendment. *Bowen* v. *Roy*, No. 84-780 (June 11, 1986), slip op. 10 (opinion of Burger, C.J., joined by Powell and Rehnquist, JJ.); *Engel* v. *Vitale*, 370 U.S. 421, 432-433 (1962); *McGowan* v. *Maryland*, 366 U.S. 420, 464 (1961) (Frankfurter, J., concurring); *Everson* v. *Board of Education*, 330 U.S. at 11. In this regard, the Court has repeatedly recognized the role of Thomas Jefferson's Virginia *Bill for Religious Liberty* as an earlier formulation of the ideas embodied in the religion clauses of the First Amendment. *McGowan* v. *Maryland*, 366 U.S. at 437; *Everson* v. *Board of Education*, 330 U.S. at 12-13; *Reynolds* v. *United States*, 98 U.S. 145, 163-164 (1878). It provided in part:

> That no man shall be *compelled* to frequent or support any religious worship, place, or ministry whatsoever, nor shall be *enforced, restrained, molested*, or *burthened* in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief[.]

Act for Establishing Religious Freedom, ch. XXXIV, 1823 Va. Acts 86 (Hening) (emphasis added) (quoted in *Everson*, 330 U.S. at 13). Similarly, James Madison, the Amendment's principal sponsor, described it as ensuring "that Congress should not establish a religion, and enforce the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience." 1 Annals of Cong. 758 (J. Gales ed. 1834) (emphasis added). It was, in short, "the historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause of the First Amendment. See generally M. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978)." *Bowen* v. *Roy*, slip op. 10 (opinion of Burger, C.J.).

Thus, the origins of the First Amendment confirm what is apparent in its language: that only relatively direct prohibiitons of the free exercise of religion are proscribed.

2. Similarly, while this Court has recognized that state actions short of direct prohibitions may violate the free exercise clause, those decisions generally reflect that the language and origins of the clause require something more than a tangential, indirect effect on the practice of religion. The Court has repeatedly focused on the nature of governmental [6] "compulsion" when determining whether a statute, as

[6] The Court has recognized that the religion clauses apply to state as well as federal action through the Fourteenth Amendment. See *McCollum* v. *Board of Education*, 333 U.S. 203 (1948) (establishment clause); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (free exercise clause). The clauses' prohibitions are at least as narrow as applied to the states, however. Cf. *Johnson* v. *Louisiana*, 406 U.S. 356, 369-377 (1972) (opinion of Powell, J.).

applied, violates a religious observer's free exercise rights. See *Bowen* v. *Roy*, slip op. 9-14 (opinion of Burger, C.J.); *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963). See also *Wisconsin* v. *Yoder*, 406 U.S. 205, 218 (1972) (noting the presence and significance of compulsion); *Engel* v. *Vitale*, 370 U.S. at 430 (emphasis added) ("[t]he Establishment Clause, unlike the free exercise clause, does not depend upon any showing of *direct governmental compulsion* and is violated by the enactment of laws which establish an official religion whether those laws operate *directly* to coerce nonobserving individuals or not").

The question presented by this case is whether a governmental decision, which has not been shown to be discriminatory in intent but has the unintended effect of creating a financial disincentive to a religious practice, can be said for that reason alone to "prohibit" the free exercise of religion. An affirmative answer proposes an extreme doctrine which is inconsistent not only with the text and intent of the free exercise clause, but the dominant course of the Court's decisions.[7]

a. It is well established that a person is not protected from every incidental burden on the exercise of his religion that may result from the implementation of a neutral, secular governmental interest. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religious practice itself, would radically restrict the operating latitude of the legislature."

[7] This case thus does not present the issue whether a "prohibitory" law which is neutrally written, motivated, and applied has violated the Free Exercise Clause. See *Wisconsin* v. *Yoder, supra.*

Braunfeld v. *Brown*, 366 U.S. 599, 606 (1961) (plurality opinion). See, *e.g.*, *McDaniel* v. *Paty*, 435 U.S. 618, 635 n.8 (1978) (Brennan, J., concurring); *Johnson* v. *Robison*, 415 U.S. 361, 383-386 (1974); *Gillette* v. *United States*, 401 U.S. 437, 461-462 (1971); see also *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, *supra*.

Thus, for instance, it would seem to be a clear implication of the extreme interpretation of the free exercise clause expressed by appellant ■ that the failure of government to subsidize a constitutionally protected choice is equivalent to placing a forbidden impediment on the exercise of that choice. This has not been the doctrine of this Court, even in cases involving constitutional rights where the limitation on government action is not expressly limited to "prohibitions." For example, in response to a claim that the failure to finance abortions constituted an infringement of that constitutionally secured liberty, the Court stated: "[I]t simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." *Harris* v. *McRae*, 448 U.S. 297, 316 (1980). See also *Maher* v. *Roe*, 432 U.S. 464, 474 (1977) (the failure to fund abortions "impose[s] no restriction on access to abortions that was not already there").

Similarly, this Court, in upholding restrictions on the election funds available to minority and new parties during a campaign (*Buckley* v. *Valeo*, 424 U.S. 1, 94-95 (1976) (footnote omitted)), drew a clear distinction between prohibiting the candidate from running for office and merely making the candidacy more difficult by not subsidizing it:

> [T]he denial of public financing to some Presidential candidates is not restrictive of voters' rights and less restrictive of candidates'. Subtitle H does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions.

In short, "[i]t is one thing to say that a State may not prohibit [an activity] and quite another to say that such [activity] must * * * receive state aid." *Norwood* v. *Harrison*, 413 U.S. 455, 462 (1973).

Accordingly, there is a clear difference between interfering with a person's ability to follow his religious beliefs and not providing him with funds to make such activity more comfortable or rewarding. Any other conclusion would go well beyond the plain meaning of the clause's language and any purpose contemplated by the Framers. For instance, the Amish would have not only the free exercise right not to attend public schools, *Wisconsin* v. *Yoder*, *supra*, but also the right to have their own special schools funded at public expense. Conversely, government would not only be foreclosed from prohibiting attendance at religious schools, but would also be required to subsidize them. Cf. *Harris* v. *McRae*, 448 U.S. at 318; *Maher* v. *Roe*, 432 U.S. at 476-477; *Norwood* v. *Harrison*, 413 U.S. at 462; *Thomas* v. *Review Board*, 450 U.S. 707, 724 n.2 (1981) (Rehnquist, J., dissenting).

It might be argued that the situation is different where the state has in place a general program for providing unemployment compensation. But this difference is of significance not with respect to whether

religious *liberty* has been restricted but only with respect to whether government has departed from its mandate of neutrality towards religion. If the question whether religious freedom has been burdened turns on whether an unemployment compensation program exists, then there is no right to government funds as such, but only to those government funds which are provided to others similarly situated. Thus, "manipulation of public benefits produces problems of equality, not freedom." Garvey, *Freedom and Equality in the Religion Clauses*, 1981 Sup. Ct. Rev. 193, 206. See *United States* v. *Lee*, 455 U.S. 252, 263-264 n.3 (1982) (Stevens, J., concurring).

For example, while exempting a religiously-motivated conscientious objector from military service furthers free exercise values, the conscientious objector who is excused from military service would not subsequently have any free exercise claim to veterans' benefits. If other nonveterans are not entitled to such benefits, then it is difficult to discern why a conscientious objector must receive them simply because he is a nonveteran for religious reasons (unless, of course, the state provided veterans' benefits to persons who avoided military service for analogous, but secular reasons). To be sure, the conscientious objector in this situation would be forced to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept [military service], on the other hand." *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963). Nevertheless, when faced with precisely this free exercise claim, the Court in *Johnson* v. *Robison*, 415 U.S. 361 (1974), ruled that the denial of special veterans' benefits to a conscientious objector was constitutionally permissible. In that

case, a conscientious objector who had performed alternative civilian service challenged the federal funding scheme that granted educational benefits only to veterans who had served in active duty on the grounds that this denial of benefits "interferes with his free exercise of religion by increasing the price he must pay for adherence to his religious beliefs" (415 U.S. at 383). The Court rejected this argument in no uncertain terms (*id.* at 385-386) (footnote omitted):

> The withholding of educational benefits involves only an incidental burden upon appellee's free exercise of religion—if, indeed, any burden exists at all. * * * Appellee and his class were not included in this class of beneficiaries, not because of any legislative design to interfere with their free exercise of religion, but because to do so would not rationally promote the Act's purposes. * * * [T]he Government's substantial interest in raising and supporting armies, Art. I, § 8, is of "a kind and weight" clearly sufficient to sustain the challenged legislation, for the burden upon appellee's free exercise of religion—the denial of the economic value of veterans' educational benefits under the Act—is not nearly of the same order or magnitude as the infringement upon free exercise of religion suffered by petitioners in *Gillette*. See also *Wisconsin* v. *Yoder*, 406 U.S. 204, 214 (1972).[8]

Last Term, Chief Justice Burger's opinion in *Bowen* v. *Roy*, *supra* (joined by Powell and Rehnquist, JJ.), drew the same distinction between prohibitory legis-

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[8] Only Justice Douglas dissented. Relying on *Sherbert*, he maintained that "[w]here Government places a price on the free exercise of one's religious scruples it crosses the forbidden line" (415 U.S. at 389 (footnote omitted)).

lation and other laws creating some incentive to compromise religious principles. "[A] mere denial of a governmental benefit by a uniformly applicable statute does not constitute infringement of religious liberty." Slip op. 10. The three Justices emphasized (*id.* at 9-10 (footnotes omitted)):

> It may indeed confront some applicants for benefits with choices, but in no sense does it affirmatively compel appellees, by threat of sanctions, to refrain from religiously motivated conduct or to engage in conduct that they find objectionable for religious reasons. * * *
>
> * * * [W]hile we do not believe that no government compulsion is involved, we cannot ignore the reality that denial of such benefits by a uniformly applicable statute neutral on its face is of a wholly different, less intrusive nature than affirmative compulsion or prohibition, by threat of penal sanctions, for conduct that has religious implications.

See also *Bob Jones University* v. *United States*, 461 U.S. 574, 603-604 (1983) ("[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets"); *Braunfeld* v. *Brown*, 366 U.S. at 605-606 (plurality opinion) (the fact that some financial sacrifice is required in order to observe religious beliefs "is wholly different than when the legislation attempts to make a religious practice itself unlawful").

Thus, this Court has repeatedly recognized the distinction between withholding benefits and compelling or prohibiting conduct. It has held with respect to the former that the free exercise clause does not require preferential treatment of religious adherents.

This is not to say that, in an extreme case, the denial of a benefit might not be so onerous that it is tantamount to a prohibition and thus runs afoul of the free exercise clause. But the general principle is sound and well-established.

b. Appellant relies on this Court's decision in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981), a subsequent and very similar case which relied heavily on it. Both opinions, particularly *Thomas*, strongly suggested that the government was required to provide unemployment benefits to those who left their jobs or could not find work for religious reasons, even if it did not provide such benefits to persons who left their jobs for analogous secular reasons. An extreme view of these cases would have them impose the obligation on the state, in the name of free exercise, of singling out religious adherents for preferential treatment in the provision of fiscal benefits—at least absent a compelling interest not to do so.

We do not wish to minimize the difficulties which these two cases present for appellee's position here. There is, however, much in *Sherbert* that supports a reading that the opinion was simply intended to enforce government neutrality among religions and between religion and non-religion. First, the South Carolina statute there reflected a sectarian preference because in one part of the statutory scheme Sunday worshippers were expressly exempted from having to make the kind of choice required of Mrs. Sherbert. 374 U.S. at 406. As the Court put it in its discussion of the establishment clause, its holding requiring "extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing

more than the governmental obligation of neutrality in the face of religious differences." 374 U.S. at 409. Moreover, the opinion suggests that if the state had disqualified from unemployment benefits all persons who left their job for personal reasons (religious and nonreligious), then it need not grant a special exemption for those who left for religious reasons. *Id.* at 401 n.4. See *Thomas* v. *Review Board*, 450 U.S. at 723-724 n.1 (Rehnquist, J., dissenting).

Further, the broader interpretation of *Sherbert* urged by appellant would seem to conflict with several other decisions of this Court, and has been expressly rejected by a number of Justices. In *Roy*, for example, the Chief Justice's opinion stated that *Sherbert* and *Thomas* did not constitute a departure from the principle that benefit programs which treat religion evenhandedly need not be supported by a compelling government interest. *Bowen* v. *Roy*, slip op. 14-15. Rather, it was precisely because the individualized "good cause" determinations made in those cases "suggest[ed] a discriminatory intent" and "exhibit[ed] hostility, not neutrality, towards religion" that the compelling governmental interest test was appropriate there. *Ibid.* Similarly, Justice Stevens has suggested that *Sherbert* and *Thomas* provided "protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect." *United States* v. *Lee*, 455 U.S. 252, 263-264 n.3 (1982) (Stevens, J., concurring). "In *Thomas* * * * and *Sherbert* * * *, the granting of a religious exemption was necessary to prevent the treatment of religious claims less favorably than other claims." *Bowen* v. *Roy*, slip op. 7 n.17 (Stevens, J., concurring). In his dissent in *Thomas*, Justice

Rehnquist wrote that *Sherbert* should at most be narrowly read (450 U.S. at 723-724 n.1).

Accordingly, there is considerable ambiguity concerning whether *Sherbert* and *Thomas* stand for the extreme proposition that government must single out religious observers for preferential provision of government benefits not provided to others similarly situated, rather than the more familiar rule that government must be neutral in the provision of such benefits. In our view, for the reasons indicated, the latter interpretation is the proper one.

3. Finally, we note that while we agree with appellee that appellant has failed to demonstrate that the statute at issue here is unconstitutional, we do not agree that the state would be forbidden from accommodating appellant's religious beliefs if it chose to do so. See Br. for Appellee 31-38; Mot. to Dis. or Aff. 21-25. But it is an additional argument against the expansive reading of the free exercise clause urged by appellant that it greatly increases the risk of a collision with the establishment clause.

a. The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *." While the establishment and free exercise clauses provide two distinct guarantees, they are "correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom." *Everson* v. *Board of Education*, 330 U.S. at 40 (Rutledge, J., dissenting). See also *Abington School District* v. *Schempp*, 374 U.S. at 232 (Brennan, J., concurring).

Nonetheless, there clearly has been a certain "tension between the two Religious Clauses." *Thomas* v.

Review Board, 450 U.S at 719,[9] and, as this Court and its Members have acknowledged, this tension has in difficult cases sometimes led to opinions which are hard to square with one another. *Walz* v. *Tax Commission*, 397 U.S. 664, 668 (1970). See also, *e.g.*, *Widmar* v. *Vincent*, 454 U.S. 263, 282 (1981) (White, J., dissenting) ("[t]he majority's position will inevitably lead to * * * contradictions and tensions between the Establishment and Free Exercise Clauses"); *Thomas* v. *Review Board*, 450 U.S. at 720 (Rehnquist, J., dissenting) ("the decision today adds mud to the already muddied waters of First Amendment jurisprudence"); *Sherbert* v. *Verner*, 374 U.S. at 414 (Stewart, J., concurring) (footnote omitted) ("the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause").[10]

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[9] Commentators have also discussed this tension. See, *e.g.*, Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 Minn. L. Rev. 545, 548-549 (1983); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 674-675 (1980); Pfeffer, *Freedom and/or Separation: The Constitutional Dilemma of the First Amendment*, 64 Minn. L. Rev. 561, 567-570 (1980); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 15 (1978-1979). See also Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1313-1327 (1970).

[10] Several explanations have been offered for the difficulties in this area. See *Thomas* v. *Review Board*, 450 U.S. at 721 (Rehnquist, J., dissenting) (tension caused by the growth of social welfare legislation, the incorporation of the First Amendment, "and perhaps most important[ly] * * * our overly expansive interpretation of *both* Clauses" (emphasis in original)); *Walz* v. *Tax Commission*, 397 U.S. at 668 ("internal inconsistency in the opinions of the Court derives from * * *

In no context has this tension been more striking than in those instances where the Court has addressed states' efforts to accommodate religion for the purpose of facilitating its free exercise. In this regard, the Court has said that the government must "maintain an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion." *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 788 (1973) (footnote omitted). See also *Lynch* v. *Donnelly*, 465 U.S. 668, 714 (1984) (Brennan, J., dissenting) (the government must "remain scrupulously neutral in matters of religious conscience"); *Abington School District* v. *Schempp*, 374 U.S. at 226; *id.* at 296-299 (Brennan, J., concurring). Yet the Court has sometimes indicated that accommodation of an individual's religious beliefs is mandated by the free exercise clause (see, *e.g.*, *Thomas* v. *Review Board*, *supra*; *Wisconsin* v.

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too sweeping utterances on aspects of these clauses"); *Sherbert*, 374 U.S. at 416-417 (Stewart, J., concurring) (antagonism results from "faliacious fundamentalist rhetoric of some of our Establishment Clause opinions"); McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 1-2 (friction due to inappropriate application of the three-part test in *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), and "subsidiary, instrumental, values"); Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. Pitt. L. Rev. 673, 686-690 (1980) (disharmony attributable to an overbroad reading of the establishment clause); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 Vill. L. Rev. 3, 15-27 (1978-1979) (inconsistency ensues from a failure to articulate and apply clear constitutional principles); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: The Religious Liberty Guarantee* (pt. 1), 80 Harv. L. Rev. 1381 (1967), *The Nonestablishment Principle* (pt. 2), 81 Harv. L. Rev. 513 (1968) (tension exacerbated by the growth of state regulation).

Yoder, *supra*; *Sherbert* v. *Verner*, *supra*), and other times has said that it is at least desirable (see, *e.g.*, *Lynch* v. *Donnelly*, 456 U.S. at 672-678; *Zorach* v. *Clauson*, 343 U.S. 306, 313-314 (1952)). And where the state has taken the initiative to effect accommodation, its efforts have often been held to violate the establishment clause. See, *e.g.*, *Aguilar* v. *Felton*, No. 84-237 (July 1, 1985); *Estate of Thornton* v. *Caldor, Inc.*, No. 83-1158 (June 26, 1985); *Committee for Public Education* v. *Nyquist*, *supra*. The broader interpretation of *Sherbert* would, in this regard, certainly seem to "impose [a] requirement[] which aid[s] all religions as against non-believers" (*Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) (footnote omitted)), and would have the "effect" of furthering religion (see *Committee for Public Education* v. *Nyquist*, 413 U.S. at 772-774; *Lemon* v. *Kurtzman*, 403 U.S. 602, 612 (1971)).[11]

b. In our view, a measure of harmony may be achieved in the interpretation of the religion clauses by a rule which holds that states should be free to ameliorate voluntarily the burdens that some of its citizens suffer by virtue of their special religious needs, but is not compelled to do so under the free exercise clause. In broader terms, a state may not promote religion but it may accommodate it.

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[11] We do not suggest that the establishment clause should be interpreted in a way to condemn as "non-secular" the objective of enlarging the scope for individual religious choice, or as "advancing religion" the effect of removing obstacles to religious practice. The creation of a society in which people are free to follow the tenets of their faiths is a truly secular purpose to which many non-believers are devoted. See *Wallace* v. *Jaffree*, No. 83-812 (June 4, 1985), slip op. 16-18 (O'Connor, J., concurring).

This approach is strongly supported by those decisions of this Court under the establishment clause, which "reflect an appropriate accommodation of our heritage as a religious people whose freedom to develop and preach religious ideas and practices is protected by the Free Exercise Clause." *McDaniel* v. *Paty*, 435 U.S. 618, 638 (1978) (Brennan, J., concurring) (footnote omitted). The Court has repeatedly recognized the legitimacy of governmental efforts to accommodate the practice of religion—that is to help create conditions in which citizens are free to decide whether to adopt a religious faith and to practice it if that is their choice. See, *e.g.*, *Lynch* v. *Donnelly*, 465 U.S. at 672-678; *Wisconsin* v. *Yoder*, 406 U.S. at 234-235 n.22; *Widmar* v. *Vincent*, 454 U.S. at 282 (White, J., dissenting). It is well established that it is permissible for states and the federal government, in their discretion, to ease restrictions or burdens that make it difficult for individuals to observe their faith or to expand opportunities for voluntary religious exercise. See, *e.g.*, *Witters* v. *Washington Dep't of Services for the Blind*, No. 84-1070 (Jan. 27, 1986) (extension of aid under state vocational rehabilitation program to finance petitioner's theological training at a Christian college); *Mueller* v. *Allen*, 463 U.S. 388 (1983) (tuition tax deductions); *St. Martin Evangelical Lutheran Church* v. *South Dakota*, 451 U.S. 772 (1981) (exemption of church-operated school employees from unemployment taxes); *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979) (implied exemption of church-operated school employees from NLRB jurisdiction); *Gillette* v. *United States*, *supra* (exemption of religious objectors from compulsory military service); *Walz* v. *Tax Commission*, *supra* (property tax exemptions for religious organizations); *Zorach* v. *Clauson*, *supra* (off-

premises public school release time programs); *Quick Bear* v. *Leupp*, 210 U.S. 50 (1908) (use of Indian trust monies for sectarian education). This is not surprising in light of the fact that the First Amendment singles out religious liberty for special protections and "contains a religious classification." *Welsh* v. *United States*, 398 U.S. 333, 372 (1970) (White, J., dissenting).

In defining the boundaries of permissible accommodation, the Court and its Members have in fact emphasized that states are not to be circumscribed by what is constitutionally compelled by the free exercise clause. *Walz* v. *Tax Commission*, 397 U.S. at 673. See also *Wallace* v. *Jaffree*, slip op. 16 (O'Connor, J., concurring); *Marsh* v. *Chambers*, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting); *TWA* v. *Hardison*, 432 U.S. 63, 90 (1977) (Marshall, J., dissenting); *Gillette* v. *United States*, 401 U.S. at 453; *Abington School District* v. *Schempp*, 374 U.S. at 299 (Brennan, J., concurring); *McGowan* v. *Maryland*, 366 U.S. at 520 (Frankfurter, J., concurring). See generally McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1, 29-34. Although in *Braunfeld* v. *Brown*, 366 U.S. 599 (1961), and *Gallagher* v. *Crown Kosher Market*, 366 U.S. 617 (1961), the plurality rejected claims that Sunday closing laws impermissibly burdened Saturday religious observers, it was careful, nevertheless, to note that exemptions for persons worshipping on other days "may well be the wiser solution." *Braunfeld* v. *Brown*, 366 U.S. at 608. Similarly, in *United States* v. *Lee*, 455 U.S. at 260-261, the Court referred with apparent approval to the congressionally-granted exemption from self-employment taxes for those with religious objections, while refusing to hold that the Constitution requires extension of that exemption to similarly objecting employees of those persons. Most importantly, in the unemployment benefits context, while there has been disagreement about whether accommodation is required under the free exercise clause, the majority *and* those dissenting have recognized that voluntary accommodation would have been permissible under the establishment clause. See *Thomas* v. *Review Board*, 450 U.S. at 719-720 (quoting *Sherbert*, 374 U.S. at 409); *Thomas*, 450 U.S. at 723 (Rehnquist, J., dissenting); *Sherbert*, 374 U.S. at 422-423 (Harlan, J., dissenting).[12]

[12] The extreme interpretation of *Sherbert* in conjunction with a broad reading of *Estate of Thornton* v. *Caldor, Inc.*, No. 83-1158 (June 26, 1985), can suggest the following view of the Constitution's religion clauses: The state is forced to treat an employer's failure to accommodate an employee's Sabbath observance as an unjustified action for purposes of paying unemployment compensation, but is unable to protect against the ensuing financial drain by treating such a failure as an unlawful employment practice. Put another way, the government may not "burden" an employee's free exercise rights by failing to accommodate his Sabbath observance, yet the same government may be precluded from accommodating all employees' Sabbath observance by the establishment clause. Moreover, as a matter of Title VII law, state employers are seemingly not required under that statute's express "religious accommodation" provision, 42 U.S.C. 2000e(j), to grant in all cases the religion-based "preferences" potentially mandated by *Sherbert*; and it could be argued that the Court has implied that such preferences might even violate the nondiscrimination mandate of that statute. *TWA* v. *Hardison*, 432 U.S. at 84-85. But see *Bowen* v. *Roy*, slip op. 18 n.19 (opinion of Burger, C.J.); *Thornton*, slip op. 2 (O'Connor, J., concurring); *TWA* v. *Hardison*, 432 U.S. at 87-91 (Marshall, J., dissenting).

We submit that this reads *Sherbert* too broadly, for reasons already discussed, and that it reads *Thornton* too broadly as well. In *Thornton*, the Court held that a Connecticut statute which required employers to provide Sabbath observers with an "absolute and unqualified right not to work on whatever day

B. A Remand Is Appropriate Because The Application Of The Florida Statute Has Not Been Explored

That the denial of unemployment benefits does not necessarily infringe on free exercise rights, however, does not mean that this could never be the case. Because the proceedings below did not develop the facts relevant to this issue, indeed because there is no statement or any consideration of the relevant constitutional issues at all, we believe that a remand is appropriate.

The Florida statute appears neutral on its face. It does not by its terms discriminate among religions or against religions generally. Cf. *Bowen* v. *Roy*, slip op. 14 (opinion of Burger, C.J.). As in *Sherbert*, however, it is possible that the statute is applied or interpreted in such a way that certain religions (*e.g.*,

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they designate as their Sabbath" violated the establishment clause. Slip op. 5 (footnote omitted). In reaching its decision, the Court stressed that the Connecticut statute necessarily placed an impermissible burden on employers and fellow workers since it provided no exceptions for special circumstances regardless of the burden or inconvenience resulting from accommodation. As such, the statute created an "unyielding weighting in favor of Sabbath observers" which might require others to " 'conform their conduct to [others'] religious necessities.' " *Id.* at 6-7 (quoting *Otten* v. *Baltimore & O.R.R.*, 205 F.2d 58, 61 (2d Cir. 1953) (L. Hand, J.)).

In contrast, if Florida were to provide unemployment compensation to religious observers, nonobservers would not be required to conform their conduct to accommodate Sabbath observers; the economic burdens which employers would apparently bear would be less onerous than the "absolute" and "unyielding" burden in *Thornton* (see Mot. to Dis. or Aff. 25, citing Fla. Stat. Ann. § 443.131(3)(a) (West Supp. 1986)). Thus, appellee's reliance (see Mot. to Dis. or Aff. 21-25) on *Thornton* is misplaced. See *Thornton*, slip op. 1-2 (O'Connor, J., concurring); see also *Wallace* v. *Jaffree*, slip op. 16-18 (O'Connor, J., concurring).

ones that worship on Sunday) are treated more favorably than appellant's or that religious impediments to continued employment generally are treated less favorably than other personal impediments.[13] It does not appear that either side has considered these issues below, although an examination of the Florida case law reveals this to be a possible issue.[14] Nor, apparently, was there any discussion by the parties of the degree of disincentive provided by the statute to religious practice. As we have said, there may come a point where a disincentive, however neutrally conceived, bears so heavily that it amounts to a prohibition and must be justified by a higher standard of necessity applicable to such prohibitions. As concrete evidence of the statute's application is developed, the tribunals below may identify additional factors of constitutional relevance.[15]

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[13] Appellant concedes (Br. 25) that, "[u]ndeniably, the purpose of the statute is wholly secular: 'to lighten [unemployment's] burden which now so often falls with crushing force upon the uenmployed worker and his family.' Fla. Stat. Ann. § 443.021."

[14] There appear to be no Florida court decisions applying the statutes to other religious claims. Certain secular exemptions, however, have been allowed by the courts. See *Langley* v. *Unemployment Appeals Comm'n*, 444 So.2d 518 (Fla. Dist. Ct. App. 1984) (failing to follow orders because of family emergency not misconduct); *Parker* v. *Department of Labor & Employment Security*, 440 So.2d 438 (Fla. Dist. Ct. App. 1983) (employee absent because he was in jail granted benefits); *Hartenstein* v. *Florida Dep't of Labor & Employment Security*, 383 So.2d 759 (Fla. Dist. Ct. App. 1980) (absence for funeral not misconduct).

[15] We have supported a remand in a case involving a similar issue under Title VII in *Ansonia Board of Education* v. *Philbrook*, cert. granted, No. 85-495 (Jan. 21, 1986). We have sent that brief to counsel for the parties in the present case.

If this Court clarifies the scope and validity of *Sherbert* and *Thomas* along the lines suggested in this brief, then a remand should follow. The parties have not had the opportunity to explicate the interpretation and application of Florida law. That explication would certainly bear on the statute's constitutionality. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, No. 85-488 (June 27, 1986), slip op. 5-9 (applying abstention doctrine in free exercise clause challenge to state law); *City of Los Angeles* v. *Preferred Communications, Inc.*, No. 85-390 (June 2, 1986), slip op. 6 (declining to resolve free speech claim "without a fuller development of the disputed issues in the case"); *Bowen* v. *Roy*, slip op. 8 (Stevens, J., concurring) (supporting remand where record was inadequate on other statutory exceptions).

CONCLUSION

For the foregoing reasons, the judgment of the court below should be vacated and the case should be remanded.

Respectfully submitted.

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No. 85-993

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PAULA A. HOBBIE,
Appellant,

vs.

UNEMPLOYMENT APPEALS COMMISSION, et al.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT
OF APPEAL OF THE STATE OF FLORIDA,
FIFTH DISTRICT

BRIEF OF THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE AMERICAN JEWISH COMMITTEE, AND THE CHRISTIAN LEGAL SOCIETY AS AMICI CURIAE IN SUPPORT OF APPELLANT

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QUESTIONS PRESENTED

1. Is the denial of unemployment compensation benefits to Appellant, a Seventh-day Adventist who was discharged for refusing to work on the Sabbath, a violation of the free exercise clause of the First Amendment?

2. Would an award of unemployment compensation benefits to Appellant violate the establishment clause of the First Amendment?

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Pursuant to Rule 36.2 of the Rules of this Court, the organizations named above file this brief in support of Appellant. Consent for the filing of this brief has

been obtained in writing from the attorneys of record for the parties in this case. Their original letters have been filed with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The Baptist Joint Committee on Public Affairs consists of representatives elected by each of eight cooperating Baptist conventions in the United States: American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These Baptist groups have nearly 30 million members and reflect the traditional Baptist concern for proper church-state

relations. The Baptist Joint Committee has as one of its mandates the obligation to respond ". . . whenever Baptist principles are involved in, or are jeopardized through, governmental action. . . ." Among Baptists, religious liberty is a fundamental and sacred principle. We believe that the principle of religious liberty as it is embodied in the First Amendment to the Constitution of the United States is at risk in the case at bar.

The American Jewish Committee, a national organization of approximately 50,000 members, was founded in 1906 to protect the civil and religious rights of Jews. It is the conviction of this organization that the civil and religious rights of Jews will be secure only when the civil and religious rights of Americans of all faiths are equally secure. To fulfill this aspiration, we

strongly support the constitutional principle of separation of religion and government. The American Jewish Committee filed a brief amicus curiae in the case of Sherbert v. Verner, 374 U.S. 398 (1963), wherein the Court ruled that a denial of unemployment compensation benefits to a Sabbatarian was violative of the free exercise clause.

The Christian Legal Society is a non-profit professional association of 3,500 Christian judges, attorneys, law professors and law students, founded in 1961. The Center for Law and Religious Freedom is a division of the Christian Legal Society founded in 1975 to protect the free exercise of religion, supporting the appropriate accommodation by the state of religious beliefs and practices and the respect for religious rights as required by the First Amendment, thus strengthening the individual citizen's respect for,

and allegiance to, our constitutional government.

SUMMARY OF ARGUMENT

The denial of unemployment compensation benefits to Appellant, a Seventh-day Adventist who was discharged for refusing to work on the Sabbath, violates the free exercise clause of the First Amendment. The gravamen of Appellant's constitutional complaint is that she is forced to choose between following the dictates of her conscience and forfeiting benefits on the one hand or abandoning her religious convictions and maintaining her employment on the other. Governmental imposition of such a choice is violative of the free exercise clause as it was interpreted by this Court in Thomas v. Review Board, 450 U.S. 707 (1981), and Sherbert v. Verner, 374 U.S. 398 (1963).

The pressure to abandon a sincerely held religious belief is no less present in this case than in Sherbert or Thomas, notwithstanding the fact that Appellant's religious conversion occurred after her employment began. In all three instances, the claimants were either terminated or forced to resign because of conflicts between their sincere religious beliefs and the terms of their employment.

Permitting the state to deny unemployment compensation benefits to Appellant would severely restrict the protection guaranteed by the free exercise clause. Individuals would have the right "to adhere to religious beliefs, but not the right to adopt such beliefs in the first instance or convert from one faith to another." Key State Bank v. Adams, 360 N.W.2d 909 (Mich. App. 1984), at 913 (emphasis added).

Fundamental to religious liberty is the freedom to expand and develop the conscience. A decision in favor of the State of Florida would hamper this development by discouraging religious conversions among those who are already employed. In short, a claimant "should not be penalized because he did not embrace his beliefs 'at the proper time.'" Engraff v. Industrial Commission, 678 P.2d 564 (Colo. App. 1983), at 568. Accordingly, amici urge the Court to reject the "agent of change" theory advanced by Appellees.

The record in the case sub judice is totally devoid of any proof that a compelling state interest exists for denying Appellant unemployment compensation benefits. Assuming arguendo that such an interest was set forth in the record, there is no evidence that a denial of benefits to Appellant is the least re-

strictive means of accomplishing that interest. Therefore, the decision of the Unemployment Appeals Commission for the State of Florida should be reversed, and benefits awarded to this sincere Seventh-day Adventist.

ARGUMENT

I. The denial of unemployment compensation benefits to Appellant, a Seventh-day Adventist who was discharged for refusing to work on the Sabbath, violates the free exercise clause of the First Amendment.

The criteria for evaluating a free exercise claim have been clearly set forth in a number of this Court's decisions. To establish a prima facie case under the free exercise clause, a claimant must establish that the challenged state action imposes a substantial burden on her free exercise of religion. Wisconsin v. Yoder, 406 U.S. 205 (1972);

Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Board, 450 U.S. 707 (1981). Unless the state then can demonstrate that the burden is justified by a compelling state interest which cannot be achieved by less restrictive means, the claimant's challenge will be sustained. Wisconsin v. Yoder, supra; Sherbert v. Verner, supra; Thomas v. Review Board, supra.

Only those exercises arising from a sincere religious belief are protected by the free exercise clause. Yoder, supra, at 216. The sincerity of Appellant's religious claim in the case sub judice is beyond question. Counsel for Respondent twice stated during the administrative hearing that "no one is doubting the sincerity of Ms. Hobbie's religious convictions." (R. 102; see also R. 70). Appellant is a devout Seventh-day Adventist, who because of her deeply held

religious beliefs is simply unable to work on Saturdays.

Equally clear is the fact that the denial of benefits in this case substantially burdens Appellant's free exercise of religion. The fact that the burden is imposed indirectly through the denial of government benefits is of no consequence. Sherbert, supra, at 404. ". . . to condition the availability of benefits upon [Appellant's] willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." Sherbert, supra, at 406.

The gravamen of Appellant's constitutional complaint is that she is forced to choose between following the dictates of her conscience and forfeiting benefits on the one hand or abandoning her religious convictions and maintaining her employment on the other. "Governmental imposi-

tion of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." Sherbert, supra, at 404.

The Court has emphatically stated:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his belief, a burden upon religion exists. Thomas, supra, at 717, 718. (emphasis added).

The pressure to abandon a sincerely held religious belief is no less present in this case than in Sherbert or Thomas, notwithstanding the fact that Appellant's religious conversion occurred after her employment began. In all three instances, the claimants were terminated or forced to resign because of conflicts between their sincere religious convic-

tions and the terms of their employment.

The critical factor in each of these decisions is that the conflict arose after the employment began. These cases are to be distinguished from the numerous state court decisions cited by Appellees wherein claimants knowingly and voluntarily accepted employment that would clash with their then-existing religious convictions. See Flynn v. Maine Employment Security Commission, 448 A.2d 905 (Me. 1982); DePriest v. Bible, 653 S.W.2d 721 (Tenn. App. 1980); Hildebrand v. Unemployment Insurance Appeals Board, 566 P.2d 1297 (Calif. 1977). Each of these state court decisions addresses a fact pattern in which the employee clearly assumed any burden on the free exercise of his religion. Accordingly, the courts quite properly held that the claimants were estopped from asserting a free exercise claim.

In contrast, Ms. Hobbie was not a Sabbatarian when she accepted employment with Lawton Jewelers. Indeed, she had no reason to believe that she would ever be unable to fulfill the terms of her employment. The absence of a pre-employment Sabbatarian belief is underscored by the fact that she worked on Saturdays for some 2 1/2 years (R. 36, 38). Thus, it cannot be said that Ms. Hobbie knowingly and voluntarily accepted employment that would conflict with her religious beliefs.

Very few courts have addressed a factual situation identical to that of Appellant Hobbie. Amici have been able to locate only two such cases, both of which were decided in favor of the employee.[1] Key State Bank v. Adams, 360

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[1] Martinez v. Industrial Commission of Colorado, 618 P.2d 738 (Colo. App. 1980) as cited by Appellees is arguably on point but has been rejected by the

N.W.2d 909 (Mich. App. 1984); Engraff v. Industrial Commission, 678 P.2d 564 (Colo. App. 1983).

Permitting the state to deny unemployment compensation benefits to Appellant would severely restrict the protection of the free exercise clause. Individuals would have the right "to adhere to religious beliefs, but not the right to adopt such beliefs in the first instance or convert from one faith to another." Key State Bank, supra, at 913 (emphasis added).

Fundamental to religious liberty is the freedom to expand and develop one's

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more recent decision of the Colorado Court of Appeals in Engraff v. Industrial Commission of the State of Colorado, above cited.

Appellees also cite Levold v. Employment Security Department, 604 P.2d 175 (Wash. App. 1979), in support of their position. However, Levold does not address a legitimate free exercise claim in that it involves a matter of mere personal preference rather than sincere religious belief.

conscience. A decision in favor of the State of Florida would hamper this development by discouraging religious conversions among those who are already employed when a conversion would create the potential for conflict with one's existing terms of employment. In short, a claimant "should not be penalized because he did not embrace his beliefs 'at the proper time.'" Engraff, supra, at 568. Accordingly, amici urge the Court to reject the "agent of change" theory[2] advanced by Appellees.

The right to change one's religious beliefs is so basic to human freedom that

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[2]Under the "agent of change" theory, Appellant would not be entitled to benefits because she, rather than her employer, changed the terms of her employment by converting to the Adventist faith. While Amici acknowledge the possible relevance of this fact as it relates to the issue of whether or not her discharge was justifiable, it should not be relevant as to whether or not Appellant is awarded unemployment compensation benefits.

it was included in the Universal Declaration of Human Rights announced by the United Nations in 1948. Incorporated into this landmark document is the right both to adopt new beliefs and to manifest those beliefs in one's public life:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. Universal Declaration of Human Rights, Article 18 (1948).

The burden imposed upon Appellant's religious exercise can be justified only if it is necessary to achieving a compelling state interest. Even then, that interest must be achieved by the least restrictive means available. Thomas, supra, at 718. This Court has described the magnitude of interest required of the state as being "of the highest order," Thomas, supra, at 718, and involving

"some substantial threat to public safety, peace, and order." Sherbert, supra, at 403. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Sherbert, supra, at 406, quoting Thomas v. Collins, 323 U.S. 516, 530 (1945).

The record in the case sub judice is totally devoid of any proof that a compelling state interest exists for denying Appellant unemployment compensation benefits. There is nothing to indicate that a significant number of fraudulent claims will arise as a result of a decision favorable to Appellant. Assuming arguendo that such proof existed, the state would still be required to demonstrate that no alternate means of controlling such abuses were available before the burden imposed upon Appellant's free exercise of religion would be justified. Sherbert, supra, at 407. In

addition, there is nothing in the record to indicate that widespread unemployment will result from an award of benefits or that a substantial strain will be placed upon the Florida Bureau of Unemployment Compensation so as to jeopardize its existence.

The state's legitimate interest in granting benefits only to those who are involuntarily unemployed is no more compelling here than in Sherbert and Thomas v. Review Board. In no real sense can Appellant's unemployment be characterized as "voluntary." Like Adell Sherbert, Ms. Hobbie's inability to work on the Sabbath was a matter of religious necessity once she had determined to become a Seventh-day Adventist. Admittedly, Appellant voluntarily became a Sabbatarian as did Ms. Sherbert. However, Appellant's subsequent unemployment was not voluntary but was the result of being discharged by

an employer who was unwilling to accommodate her constitutionally protected religious practices. (R. 79, 80, 104).

The Court has never declared an unqualified constitutional right to unemployment compensation benefits for all persons whose unemployment arises from sincere religious convictions. According to the Court, this right might not exist where an employee's religious convictions "serve to make him a nonproductive member of society." Sherbert, supra, at 410. However, there is nothing in the opinions of the Court to indicate that this right should not be extended to a Sabbatarian such as Ms. Hobbie, who has demonstrated her suitability and availability for employment on all days other than Saturday.

II. An award of unemployment compensation benefits to Appellant would not violate the establishment clause of the First Amendment.

Appellees maintain that an award of benefits in this case would violate the establishment clause of the First Amendment. In support of this contention, Appellees cite a recent decision Estate of Thornton v. Caldor, _____ U.S. _____, 105 S.Ct. 2914 (1985). Appellees are mistaken both in their assertion concerning the establishment clause and in their reliance upon Caldor.

Unlike Caldor, there has been no attempt by Appellant to impose an absolute duty on the employer, Lawton Jewelers, to conform its business practices to Appellant's religious beliefs. To the contrary, the only obligation imposed upon Lawton Jewelers is one of reasonable accommodation pursuant to 42 U.S.C. §2000e(j). Because this is not an

action pursuant to 42 U.S.C. §2000e et seq., the question of the employer's duty of reasonable accommodation is not at issue. Instead, this is an action for unemployment compensation benefits and is not controlled by Caldor.

This Court has long recognized that government in some circumstances may accommodate one's exercise of religion by creating exemptions or exceptions for religious observers without violating the establishment clause. E.g., Wisconsin v. Yoder, supra; Braunfeld v. Brown, 366 U.S. 599 (1961). Persons who, for reasons of religious training and belief, are conscientiously opposed to war in any form have long been exempt from combat, 50 U.S.C. §456(j); and religious employers are exempt from certain claims of employment discrimination under Title VII (42 U.S.C. §2000e-1) and Title IX [20 U.S.C. §1681(a)(3)]. In fact, the Court

in both Sherbert and Thomas v. Review Board expressly addressed the contention that an award of benefits to a claimant such as Ms. Hobbie would constitute an unconstitutional establishment of religion:

> The respondents contend that to compel benefit payments to Thomas involves the State in fostering a religious faith. There is, in a sense, a "benefit" to Thomas deriving from his religious beliefs, but this manifests no more than the tension between the two Religious Clauses which the Court resolved in Sherbert:
>
> "In holding as we do, plainly we are not fostering the 'establishment' of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall." Sherbert v. Verner, 374 U.S. at 409, 83 S.Ct., at 1796.

Thomas v. Review Board, supra, at 719, 720.

CONCLUSION

Amici urge the Court to maintain its firm commitment to religious liberty by awarding unemployment compensation benefits to this Seventh-day Adventist who was discharged for refusing to work on the Sabbath. Such an award is in keeping with the Court's previous decisions interpreting the First Amendment and with the Universal Declaration of Human Rights. A denial of benefits will restrict religious liberty by discouraging religious conversions among those who are already employed when a conversion would create the potential for conflict with one's existing terms of employment.

For the above-mentioned reasons, amici respectfully ask that the decision

of the Unemployment Appeals Commission of the State of Florida be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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No. 85-993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAULA A. HOBBIE,

Appellants,

v.

UNEMPLOYMENT APPEALS COMMISSION AND LAWTON AND COMPANY,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

~~MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND~~ BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League), pursuant to Rules 36.3 and 42 of the Rules of this Court, moves for leave to file the appended brief amicus curiae in this matter.

The League is a voluntary non-profit organization dedicated to the right to religious freedom and the right to life of all, born or pre-born. The League is especially interested in helping insure the American people's continued enjoyment of the strong protections afforded religious freedom in this Court's Free Exercise Clause cases. To this end the League has filed amicus curiae briefs before this Court in its most recent considerations of the Free Exercise Clause, *Goldman v. Weinberger,* 106 S. Ct. 1310 (1986) and *Bowen v. Roy,* No. 84-780. This brief is another expression of this interest.

The initial question of law which the League will address is the controlling nature of *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Thomas v. Review Board,* 450 U.S. 707 (1981) on this Court's disposition of this matter. The further question of law the League will address is the necessity for this Court to continue to adhere to the requirements of religious accommodation found in its decisions in *Sherbert* and *Thomas* rather than to adopt a standard of deference to any facially neutral state statute regardless of its impact upon the free exercise of religion. This latter position appears to have been suggested in Justice Stevens' recent concurring opinion in *Goldman v. Weinberger,* 106 S. Ct. 1310, 1314-1316 (1986) (Stevens, J., concurring). While the League believes the parties will adequately brief the question of the controlling nature of *Sherbert* and *Thomas,* the League believes that the parties may not extensively consider the impact of Justice Stevens' position on Free Exercise Clause jurisprudence. The League believes this may be the case because appellant will likely concentrate on presenting the strong reasons why *Sherbert* and *Thomas* mandate a holding in her favor and appellees will likely take the opposite view from the League; i.e., advocating reversal of *Sherbert* and *Thomas.* Because adoption of Justice Stevens' position would fundamentally

change the factual and legal showings involved in Free Exercise Clause cases, the propriety of this position is most relevant to the disposition of this Free Exercise Clause matter. Accordingly, the League's brief could provide the Court with valuable input concerning the future development of Free Exercise Clause jurisprudence from a group which has had a continuing concern with the development of this jurisprudence.

The League has obtained the written consent of the counsel of record for the Unemployment Appeals Commission to the filing of this brief. The original of that letter has been filed with the Clerk. In addition, the League has received oral consent from the counsel of record for Paula Hobbie to the filing of this brief. Written consent will likely also be forthcoming and will be filed with the Clerk when received. However, the League has not received any communication regarding consent from the counsel of record for Lawton and Company. Accordingly, a motion for leave to file brief amicus curiae is currently necessitated.

For the foregoing reasons, the League moves to file the appended brief amicus curiae.

Respectfully submitted,

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JUNE 4, 1986

No. 85-993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAULA A. HOBBIE,

Appellant,

v.

UNEMPLOYMENT APPEALS COMMISSION
AND LAWTON AND COMPANY

Appellee.

BRIEF FOR THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS, AMICUS CURIAE, IN SUPPORT OF APPELLANT

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is contained in the Motion for Leave to File Brief Amicus Curiae attached to this brief.

SUMMARY OF ARGUMENT

This Court's previous holdings in *Sherbert v. Verner,* 374 U.S. 398 (1963), and *Thomas v. Review Board,* 450 U.S. 707 (1981), clearly demonstrate that the Free Exercise Clause mandates accommodation of Paula Hobbie's religious beliefs and the finding of her eligibility for state unemployment benefits. The controlling effect of *Sherbert* and *Thomas* is not altered by the fact that Paula Hobbie converted to a sabbatar-

ian religion after she had been employed. The Free Exercise Clause protects the exercise of all religious beliefs, irrespective of length of practice. It would be anomalous if Paula Hobbie's change in religious belief, an action at the heart of religious freedom, disqualified her from Free Exercise Clause protection.

This Court should continue to adhere to its precedents in *Sherbert* and *Thomas*. These cases properly implement the interest of religious liberty underlying the Free Exercise Clause by requiring accommodation of religious exercise unless governmental infringement of such exercise is a narrowly tailed means to promote compelling state interests. Interests in religious liberty, however, are not adequately protected by the approach to Free Exercise Clause cases suggested by Justice Stevens in his concurrence in *Goldman v. Weinberger*, 106 S. Ct. 1310, 1314-1316 (1986) (Stevens, J., concurring). This approach upholds state practices against Free Exercise Clause challenge if they utilize neutral, objective standards which treat all uniformly and are motivated by neither "hostility against, nor special respect for, any religious faith." 106 S. Ct. at 1316 (Stevens, J., concurring).

Justice Stevens' proposed standard fails to properly implement the Free Exercise Clause for several different reasons. Initially, the Stevens position reflects an overly expansive interpretation of Establishment Clause policies and, thus, fails to accord the Free Exercise Clause its proper co-equal status. The standard also fails because it is incompatible with the Free Exercise Clause's vital role as a defense against any governmental infringement upon religious exercise which is not a narrowly tailored means to promote compelling state interests. Further, the "uniform treatment" of all religions purportedly promoted by judicial deference to any facially neutral requirement a state enacts is inconsistent with the fundamental constitutional position that the First Amendment's protection of religious free exercise must control how the State treats adherents of various religions. These difficulties with the position advocated by Justice Stevens clearly demonstrate why the accommodation of religious exercise normally required by *Sherbert* and *Thomas* is central to the

effective implementation of the interests in religious liberty underlying the Free Exercise Clause.

ARGUMENT

I.

THE FREE EXERCISE CLAUSE, AS INTERPRETED IN *SHERBERT V. VERNER* AND *THOMAS V. REVIEW BOARD*, REQUIRES ACCOMMODATION OF PAULA HOBBIE'S RELIGIOUS PRACTICES AND A FINDING OF ELIGIBILITY FOR UNEMPLOYMENT BENEFITS.

This case involves the same Free Exercise Clause based challenge to state unemployment eligibility decisions found in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Thomas v. Review Board*, 450 U.S. 707 (1981). This Court's holdings in *Sherbert* and *Thomas* require a decision that the Free Exercise Clause was violated when Florida denied Paula Hobbie unemployment benefits.

Sherbert v. Verner, 374 U.S. 398 (1963), alone appears to require a decision in favor of Paula Hobbie. In *Sherbert*, as here, an employee terminated for not working on Saturdays was denied unemployment benefits. South Carolina sought to justify this exclusion on the basis of Mrs. Sherbert's refusal to accept employment involving Saturday work. This Court, however, found that:

> [N]ot only is it apparent that [Sherbert's] declared ineligibility for benefits derived solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling [disqualifying Sherbert from receiving unemployment benefits] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the exercise of religion as would a fine imposed against [Sherbert] for her Saturday worship.

Sherbert, 374 U.S. at 404. The Court also found that neither

the threat of fraudulent religiously based unemployment claims nor problems resulting to the unemployment compensation scheme from grants of religious accommodation were sufficiently compelling to overcome the infringement upon Sherbert's free exercise. 374 U.S. at 407-409. Similarly, the Court squarely recognized that the accommodation required by the Free Exercise Clause does not violate the Establishment Clause. *See* 374 U.S. at 409-410.

Application of *Sherbert* to this case clearly requires the conclusion that Paula Hobbie, like Adell Sherbert, was denied unemployment benefits on account of her sabbatarian religious beliefs. As in *Sherbert,* there does not appear a sufficiently compelling state interest to preclude accommodation of Hobbie's sabbatarian religious beliefs to the state unemployment scheme.

This Court's decision in *Thomas v. Review Board,* 450 U.S. 707 (1981), equally clearly calls for a conclusion that Paula Hobbie was impermissibly denied unemployment benefits. In *Thomas,* Indiana impermissibly attempted to disqualify an unemployment claimant from benefits on the ground that the claimant's religiously based termination of employment, flowing from religious objections to his work, was not for "good cause arising in connection with employment." *See* 450 U.S. at 712-713. This disqualification is virtually identical to Florida's disqualification of Hobbie on account of a termination for "misconduct" associated with employment. Finding that Indiana's attempt to disqualify Thomas from eligibility for unemployment benefits violated the Free Exercise Clause in the same fashion as South Carolina's attempts to disqualify Sherbert, this Court observed:

> Here, as in *Sherbert,* the employee was put to a choice between fidelity to religious belief or cessation of work; the coercive impact on Thomas is indistinguishable from *Sherbert,* where the Court held:
>
> > [N]ot only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable.

> Where the state conditions receipt of an important benefit upon conduct proscribed by religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[1]

Thomas, like *Sherbert,* clearly requires that Florida permit Paula Hobbie to receive unemployment benefits in this matter.

The fact that Paula Hobbie converted to a sabbatarian religion while employed does not alter the Free Exercise Clause analysis. The Free Exercise Clause protects the exercise of an individual's religious beliefs without reference to the length of time the individual has adhered to these beliefs. *Cf., Thomas,* 450 U.S. at 715-716 (Court will recognize religious beliefs as entitled to protection under Free Exercise Clause even though they are not very well articulated and are not shared by certain other adherents of the same religion). Indeed, *Thomas* and *Sherbert* themselves both involve situations in which changed conditions rendered objectionable employment which had been previously acceptable. *Thomas,* 450 U.S. at 718. It would be implausible to conclude that Paula Hobbie's change in religious belief, an action at the heart of the religious freedom protected by the Free Exercise Clause, is not protected by the Free Exercise Clause in the same fashion as the changes in employment conditions which secondarily affected employees' free

---

[1] 450 U.S. at 717-718 (citation omitted). The court went on to hold that Indiana's purported justifications for its actions, the avoidance of unemployment occasioned by terminations for "personal" reasons and the avoidance of detailed employer probing into job applicants' religious beliefs, were insufficient to justify Thomas's disqualification. *See* 450 U.S. at 718-719. The Court also relied upon *Sherbert* for the proposition that Free Exercise Clause based accommodation does not violate the Establishment Clause. *See* 450 U.S. at 719-720.

exercise of religion in *Sherbert* and *Thomas*. If the Free Exercise Clause is to mean anything, all religious exercise, regardless of its length of practice, should be equally protected against state interference. Accordingly, *Sherbert* and *Thomas*, viewed in the context of the policy of religious liberty undergirding the Free Exercise Clause, require Florida to accommodate Paula Hobbie's religious practices and to find her eligible for unemployment benefits.

II.

THE ACCOMMODATION OF RELIGIOUS BELIEFS FOUND IN *SHERBERT* AND *THOMAS*, RATHER THAN INSISTENCE UPON "UNIFORM" TREATMENT WHICH IGNORES RELIGIOUS INFRINGEMENT, IS THE ONLY SUITABLE MEANS TO IMPLEMENT THE REQUIREMENTS OF THE FREE EXERCISE CLAUSE.

In this Court's recent decision in *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986), Justice Stevens authored a concurring opinion, joined by Justices White and Powell, in which he suggested that state practices were consistent with the Free Exercise Clause if they utilized neutral, objective standards which treated all uniformly and which were motivated by neither "hostility against, nor special respect for, any religious faith." 106 S. Ct. at 1316 (Stevens, J., concurring). *See also, U.S. v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in the judgment). In essence Justice Stevens' position is that the Free Exercise Clause does not mandate the type of accommodation of religious beliefs to facially neutral state requirements called for in *Sherbert* and *Thomas*, and that the evaluation of the beliefs of religiously motivated individuals necessary for such an accommodation cannot be squared with the proper role of government under the Establishment Clause. *See, Goldman*, 106 S. Ct. at 1316 n. 6 (Stevens, J., concurring).

A careful consideration of Justice Stevens' proposed test, however, illustrates the test's fundamental inconsistency with the effective implementation of the Free Exercise Clause and the values of religious freedom underlying both the Free Exercise Clause and the Establishment Clause. Such a consideration also most clearly demonstrates that the Court's past practice of accommodating religious beliefs to state regulatory practices is the only means to satisfactorily implement the Free Exercise Clause and its underlying religious freedom values.

Predictably, Justice Stevens points to Establishment Clause precedent for the proposition that a state may not consider religious exercise in enforcing statutes of uniform application. *See* 106 S. Ct. at 1316 n. 6. However, use of this precedent ignores the cogent discussions in *Sherbert v. Verner*, 374 U.S. at 409-410, and *Thomas v. Review Board*, 450 U.S. at 719-720, which clearly demonstrate that the incidental "benefit" to religion resulting from the accommodation of religious exercise required by these decisions "manifests no more than the tensions between the two Religious Clauses." *Thomas*, 450 U.S. at 719. The Establishment Clause is as important as, but not more important than, the Free Exercise Clause. The fact that the Establishment Clause could be interpreted in a fashion which could lead members of the Court to believe its policies would preclude the accommodations of religious practice previously held required by its constitutional counterpart, the Free Exercise Clause, suggests that it is Establishment Clause precedent rather than Free Exercise Clause precedent which has been read too broadly.

Justice Stevens' view that any facially neutral state practice can survive Free Exercise Clause scrutiny is also incompatible with the policy of religious freedom which the Free Exercise Clause implements. In criticizing Justice Stevens' apparent position that the impact of a facially neutral practice on the exercise of religion is irrelevant for purposes of analysis under the Free Exercise Clause, Justice Brennan properly noted that: "[T]he Constitution requires [governmental] selection of criteria that permit the greatest possible number of persons to practice their faith freely." *Goldman*, 106 S. Ct. at 1320 (Brennan, J., dissenting). Justice Brennan's statement highlights a truth ignored by Justice Stevens' analysis, the vital importance of the Free Exercise Clause as a defense against any governmental infringement upon reli-

gious exercise which is not a narrowly tailored means to promote compelling state interests.

The shortcomings of Justice Stevens' approach to the Free Exercise Clause are even more clearly seen in Justice Brennan's criticism of Justice Stevens' position that "uniform treatment" of all religions is promoted by judicial deference to any facially neutral requirement a state enacts. Justice Brennan points out that the fundamental difficulty with this approach is that: "Government agencies are not free to define their own interests in uniform treatment of different faiths. That function has been assigned to the First Amendment. The First Amendment requires that the burdens on Free Exercise be justified by independent and important interests that promote the function of the agency. *See, e.g., U.S. v. Lee; Thomas v. Review Board; Wisconsin v. Yoder; Sherbert v. Verner.*" 106 S. Ct. at 1321 (Brennan, J., dissenting) (certain citation material omitted). *Accord, Goldman,* 106 S. Ct. at 1322 (Blackmun, J., dissenting) ("The clear impact of *Sherbert, Yoder,* and *Thomas* is that this showing [that infringement upon religious liberty is the least restrictive means of achieving a compelling state interest] must be made even when the inroad results from the 'evenhanded' application of a facially neutral requirement.")

Clearly, the approach to Free Exercise Clause cases advocated by Justice Stevens in his concurring opinion in *Goldman* improperly places Establishment Clause concerns above Free Exercise Clause concerns and, even more importantly, ignores the interests of maximizing the enjoyment of religious liberty and preventing arbitrary governmental interference with religious liberty which give substance to the Free Exercise Clause. Accordingly, this Court should continue to adhere to the accommodation approach utilized in *Sherbert* and *Thomas,* which gives proper weight to the fundamental interests in religious liberty underlying the Free Exercise Clause. As demonstrated in Section I, *supra,* this approach requires the accommodation of Paula Hobbie's religious practices and reversal of the lower court's decision denying Hobbie unemployment benefits.

CONCLUSION

The decision of the state court of appeals should be reversed.

Respectfully submitted,

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JUNE 4, 1986

No. 85-993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PAULA A. HOBBIE, *Appellant*,

v.

UNEMPLOYMENT APPEALS COMMISSION AND LAWTON AND COMPANY, *Appellees*.

On Appeal From The District Court Of Appeals Of The State Of Florida Fifth District

---

BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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BRIEF OF COUNCIL ON RELIGIOUS FREEDOM AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

INTEREST OF THE AMICUS CURIAE

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include taking action to eliminate religious discrimination in public and private employment and other areas of concern which interfere with the full experience of religious freedom.

The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in

religious affairs, some in official capacity, and some on a lay basis, but all recognize the importance of preserving and promoting the concept of the constitutional principle of the "free exercise of religion" and opposing any encroachment by private or governmental agenices which limit or tend to inhibit the free exercise of religion.

SUMMARY OF ARGUMENT

In this case Hobbie was denied unemployment benefits under a portion of the Florida statute that held an individual ineligible for employment benefits on the basis of "misconduct."

In this Court's ruling in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Thomas* v. *Review Board*, 450 U.S. 707 (1981), it was determined that the First Amendment required that religious convictions which proscribed secular work during an employee's Sabbath hours be considered "good cause" for refusing to accept work. It would also be a violation of an individual's constitutional rights to allow a state to label the same employee's actions "misconduct connected with . . . work."

The standard of "misconduct" present in the Florida statute clearly sets up a mechanism for individual exemptions. To classify the religiously-motivated actions of Hobbie as misconduct shows a much greater hostility towards religion than was present in *Sherbert* and *Thomas*. The principles applied in *Sherbert* and *Thomas* should, therefore, control the results in this case.

The fact that the conflict between an individual's religious practices and an employer's work requirements resulted from a recent religious conversion, as distinguished from a pre-existing religious conviction, has no constitutional significance so long as those beliefs are

sincerely held. The Free Exercise Clause protects not only the right to hold a belief but the equally important right to change a belief.

ARGUMENT

I. THIS CASE IS CONTROLLED BY THE COURT'S DECISION IN *SHERBERT* v. *VERNER* AND *THOMAS* v. *REVIEW BOARD*.

In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court ruled that unemployment benefts could not be denied to a worker who refused to accept employment that would have required her to work on her Sabbath in violation of her religious beliefs. For 23 years *Sherbert* has stood as a landmark in the field of religious free exercise. The strength of the principles announced in *Sherbert* were reaffirmed just five years ago in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), when this Court ruled that unemployment benefits could not be denied to a worker who quit his job because his religious beliefs did not allow him to work in the manufacture of armaments.

The continued vitality of these principles in the area of unemployment compensation was most recently recognized in *Gleason* v. *Blanche*, No. CA-4779 (La. Ct. App. April 11, 1986), (the court rules that, under holding of *Thomas* v. *Review Board*, the unemployment review board must consider free exercise rights of a woman discharged for religious based refusal to wear pants uniform after conversion to new religion).

In ruling that the denial of benefits imposed a burden on Mrs. Sherbert's free exercise of religion, the Court said:

> Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling

> forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Sherbert, 374 U.S, at 404.

This Court in *Thomas* held:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas, U.S., at 717-718.

In *Sherbert*, the South Carolina statute denied unemployment benefits to a worker who "failed, without good cause, . . . to accept available suitable work when offered him by the employment office or the employer." *Sherbert*, 374 U.S., at 400, n.3. In *Thomas*, the Indiana statute denied benefits to a worker "who ha[d] voluntarily left his employment without good cause in connection with the work. . . " *Thomas*, 450 U.S., at 710, n.1

In this case Hobbie was denied benefits under a portion of the Florida statute declaring ineligible individuals "discharged by his employing unit for misconduct connected with his work." Section 443.100, Florida Statutes.[1]

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[1] The pertinent portions of the Florida statute are as follows:

Section 443.101, Florida Statutes: An individual shall be disqualified for benefits: (1)(a) for the week in which he has voluntarily left his employment without good cause attributable to his employer or in which he has been discharged by his employing unit for misconduct connected with his work, if so found by the division.

Section 443.036(24), Florida Statutes: "Misconduct" includes, but is not limited to, the following which shall not be construed in *pari materia* with each other:

(a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or

(b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent or evil design, or to allow an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

In *Sherbert* and *Thomas*, the Court concluded that the First Amendment required that the religious convictions of the claimants be considered "good cause" for refusing to accept work or voluntarily quitting work. It would be a grievous violation of the Free Exercise Clause for the State of Florida to be allowed to label the observance of the same religious belief that was at issue in *Sherbert* as "misconduct connected with . . . work."

Chief Justice Burger, writing in *Bowen* v. *Roy*, 54 U.S.L.W. 4603 (U.S. June 11, 1986), stated:

> The "good cause" standard [existing in *Sherbert* and *Thomas*] created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus, as was urged in *Thomas*, to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion.

Id., at 4607-4608.

The standard of "misconduct" present in the Florida statute clearly sets up a mechanism for individual exemptions. To classify the observance of a religious belief as misconduct shows a much greater hostility towards religion than was present in *Sherbert* or *Thomas*.

II. THIS CASE IS NOT DISTINGUISHABLE FROM *SHERBERT* AND *THOMAS* BECAUSE OF THE RELIGIOUS CONVERSION OF THE APPELLANT.

Any argument that this case should be distinguished from *Sherbert* and *Thomas* because the conflict between Hobbie's religious beliefs and the requirements of her employer arose after her religious conversion as opposed to a change in the work requirements must be rejected. The Free Exercise Clause protects not only the right to hold a belief, but the right to change one's beliefs.

> If judicial inquiry into the truth of one's religious beliefs would violate the free exercise clause, *see United States* v. *Ballard*, *supra*, 332 U.S. at 87, 64 S.Ct. at 886, an inquiry into one's reasons for adopting those beliefs is similarly intrusive. So long as one's faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith derived from revelation, study, upbringing, gradual evolution, or some source that appears entirely incomprehensible.

Callahan v. *Woods*, 658 F.2d 679, 687 (9th Cir. 1981).

Newly held beliefs are protected no less than lifelong beliefs. *Stevens* v. *Berger*, 428 F.Supp. 896, 900 (E.D. N.Y. 1977).

The argument that Hobbie was the "agent of change" and is therefore in some way entitled to less protection than was afforded in *Sherbert* and *Thomas* indicates a perception that religious conversion is some sort of whimsical choice on the part of the believer. This perception shows a basic misunderstanding of the fundamental nature of religious beliefs. Religious beliefs by their nature are compelling. The language of a religion is replete with terms that demonstrate this fact. One answers a "calling" from God. One observes the "dictates" of his or her religion. The Latin root of the word "religion" means "to bind." *See*, *Websters' New Universal Unabridged Dictionary*, at 1527 (2nd Ed. 1983).

One of the central policies of the Free Exercise Clause is to prevent an individual from being put into a position of having to choose between the dictates of his or her religion and the commands of the government. *Sherbert*, 374 U.S., at 404. Once Hobbie became convicted of the truth of the teachings of the Seventh-day Adventist Church, her conversion was compelled, and she was bound to follow the dictates of that church.

One final point weighs against any argument based on Hobbie's being the "agent of change." After her conversion, Hobbie worked out an accommodation with her supervisor that allowed her to observe the Sabbath. This arrangement worked smoothly for two months. At that point, Hobbie's employer unilaterally decided to end this accommodation and require Hobbie to work on the Sabbath. Under these facts, this case is no different than *Sherbert* in which a change in work schedules caused the conflict leading to discharge.

CONCLUSION

Sherbert and *Thomas* are cornerstones in the foundation of free exercise protections. They are the controlling law in this case. This Court should correct a clear error in constitutional law and reverse the decision of the Florida Court of Appeals.

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No. 85-993

IN THE

Supreme Court of the United States

October Term, 1985

PAULA A. HOBBIE,

Appellant,

v.

UNEMPLOYMENT APPEALS COMMISSION AND LAWTON AND COMPANY,

Appellees.

On Appeal From the District Court of Appeal of the State of Florida Fifth District

BRIEF OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE AMERICAN CIVIL LIBERTIES UNION, *AMICI CURIAE*

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INTEREST OF THE AMICI

The American Jewish Congress ("AJCongress") is an organization of American Jews founded in 1918 to protect the civil, economic and political rights of American Jews and all Americans. It is committed to the preservation of the great freedoms secured by the First Amendment to the Constitution, especially the rights secured by the Establishment and Free Exercise Clauses. To further these ends, AJCongress has filed briefs amicus curiae in numerous cases in state and federal courts in which the meaning of the Religion Clauses has been at issue.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members. It was founded over 60 years ago and is dedicated to defending and preserving the principles embodied in the Bill of Rights.

The ACLU has been involved in many of the leading First Amendment cases in which Free Exercise rights have been threatened.

This brief is submitted with the consent of the parties.

STATEMENT OF THE CASE

Appellant Paula Hobbie ("Hobbie") was an assistant manager of a jewelry store in Florida, one of a chain of jewelry stores owned by appellee Lawton and Company ("Lawton"). Lawton's corporate policy required that assistant managers and managers be present in the stores on Friday nights and Saturdays, the times of heaviest sales.

In May 1984, more than two years after she began working for Lawton, Hobbie became a Seventh Day Adventist. Hobbie promptly informed her immediate supervisor, the store manager, that her new found religious beliefs prohibited her from working on Friday nights and Saturdays[1]. Notwithstanding Lawton's corporate policy, Hobbie and her supervisor worked out an arrangement by which he worked Friday nights and Saturdays, and Hobbie worked Sundays.

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[1] The sincerity of Hobbie's religious beliefs is not questioned.

Although this arrangement apparently worked out well for several weeks, it soon came to the attention of the store manager's supervisor. He ordered Hobbie and the store manager she worked for to end their arrangement, advising them that Lawton's corporate policy permitted no exceptions to the Friday night and Saturday work rule. Hobbie refused to work on her Sabbath and so Lawton, apparently without making any effort whatsoever to accommodate Hobbie's Sabbath observance, fired her.

Shortly thereafter, Hobbie filed a claim with the Florida Department of Labor and Employment Security for unemployment benefits. Lawton contested payment of unemployment benefits, and they were denied pursuant to Florida Statute § 443.101(1)(a), because Hobbie's refusal to work on her Sabbath constituted "misconduct connected with work."

The Appeals Referee of the Florida Department of Labor and Unemployment Security - Unemployment Compensation Appeals Bureau affirmed the denial of Hobbie's unemployment benefits holding (without citation to supporting authority) that

> the law cannot be readily construed to require an employer to discriminate against other employees in order to enable others to observe their Sabbath. In view of the testimony ... it must be held that the claimant was discharged from the job for misconduct connected with the work when she refused to work the hours scheduled for her.

Hobbie appealed the Referee's order to the Unemployment Appeals Commission ("Commission") which affirmed the Referee's decision without opinion. Hobbie appealed the Commission's order to the District Court of Appeal of the State of Florida, Fifth District, which affirmed the Commission's order, also without opinion, per curiam. This appeal followed.

SUMMARY OF ARGUMENT

Denying unemployment benefits to appellant Hobbie, who was fired because she refused to violate her religious beliefs against working on her Sabbath, constitutes a violation of the Free Exercise Clause. As the Court has held in two decisions directly controlling this case, Sherbert v. Verner and Thomas v. Review Board, the state burdens religion when it denies an important benefit because of conduct mandated by religious beliefs. When, as in this case, the state has made no showing that the interests in support of the denial of benefits are compelling, the state is unconstitutionally infringing upon free exercise.

The applicability of Sherbert and Thomas to th s case is not affected by this Court's recent decision in Bowen v. Roy. Nor is this case distinguishable from Sherbert and Thomas merely because Hobbie's

religious awakening took place during the course of her employment.

Finally, permitting Hobbie unemployment benefits would no more establish religion than did the Court's requiring payment of such benefits in Sherbert and Thomas. The Court's decision in Estate of Thornton v. Caldor does not suggest otherwise.

ARGUMENT

DENIAL OF UNEMPLOYMENT COMPENSATION BENEFITS TO AN EMPLOYEE WHO IS FIRED FOR REFUSING, FOR REASONS OF RELIGIOUS CONSCIENCE, TO FOLLOW HER EMPLOYER'S CORPORATE POLICY, REQUIRING WORK ON FRIDAY NIGHT AND SATURDAY, VIOLATES THE FREE EXERCISE CLAUSE

As a Sabbatarian, Hobbie was unable to comply with her employer's corporate policy requiring work on Friday night and Saturday, and she was fired for that refusal. Notwithstanding Hobbie's arrangement with her supervisor to cover for her absence, and the lack of record evidence indicating that her absence caused her employer harm, the Commission affirmed a denial of unemployment compensation benefits for Hobbie. It held that her refusal to follow corporate policy constituted "misconduct connected with work," pursuant to Florida Stat. § 443.101 (1983).

That holding is plainly erroneous. Almost 40 years ago, this Court held that no person may be required to choose between exercise of a First Amendment right and participation in an otherwise available public program, because no state is permitted, for less than a compelling reason, to:

> exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.

Everson v. Board of Education, 330 U.S. 1, 16 (1949) (emphasis deleted). Florida Stat. § 443.101, construed and applied to require forfeiture of benefits by an employee who refuses, for reasons of religious conscience, to conform strictly to her employer's rules -- while allowing payments

for those asserting other personal reasons -- impermissibly restricts that employee's religious liberty.

A. This Case Is Controlled by Sherbert v. Verner and Thomas v. Review Board

In Sherbert v. Verner, 374 U.S. 398 (1963), this Court addressed the question of whether a Seventh Day Adventist could be denied unemployment benefits after she was discharged by her employer for refusing to work on her Sabbath. She was unable to obtain other work because her religious beliefs prohibited work on Saturdays. Unemployment compensation benefits were denied under the South Carolina statute because, as a result of her unavailablity for Saturday work, she "failed, without good cause ... to accept suitable work when offered...."

This Court declared the disqualification statute, as applied to Sherbert, unconstitutional. The Court concluded that the withholding of benefits interfered with free exercise to the same extent as a fine imposed for Saturday worship. It rejected the bare assertion, unsupported by any evidence, that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might dilute the unemployment compensation fund and burden the scheduling by employers of necessary Saturday work. Rather, it held that it would be incumbent on the state to demonstrate that no alternative form of regulation would combat such abuses without infringing First Amendment rights. The state was unable to make any such demonstration.

Eighteen years later, the Court reaffirmed the Sherbert holding in Thomas v. Review Board, 450 U.S. 707 (1981). In Thomas, a Jehovah's Witness was denied unemployment benefits after he refused to work for an employer who was engaged directly in the production of armaments. Although Thomas initially worked in his employer's steel foundry, which fabricated sheet steel for a variety of uses, the foundry was closed, and the only jobs remaining involved weapons production, which he could not participate in as a matter of religious conscience.

The Court reasoned that "as in Sherbert, the employee was put to a choice between fidelity to religious belief or cessation of work...." 450 U.S. at 717. The Court held, therefore that:

> where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Id. at 717-18.

Echoing Sherbert, Chief Justice Burger's majority opinion in Thomas concluded that none of the interests advanced by the state in support of the denial of unemployment compensation benefits (to avoid widespread unemployment and consequent burden on the system if people left jobs for "personal" reasons and to avoid detailed probing by employers into job applicants' religious beliefs) were sufficiently compelling to justify the burden on Thomas' religious liberty. Id. at

718-19. Accordingly, the Court held that Thomas was unconstitutionally deprived of unemployment compensation benefits.

Hobbie's dilemma is indistinguishable from the difficult choices faced by the plaintiffs in Sherbert and Thomas. Hobbie, like Sherbert and Thomas, could not continue her employment because to do so would violate her religious precepts.

In Sherbert, the employee was dismissed when the plant added a Saturday shift. In Thomas, the employee resigned when his work changed to weapons production. Here, Hobbie was dismissed because her newly awakened religious conscience forbade continued adherence to the required work schedule. "In [all three] cases, the termination flowed from the fact that the employment, once acceptable, became

religiously objectionable because of changed conditions." Thomas, 450 U.S. at 718.

Two possible objections to the application of Sherbert and Thomas to this case can be raised. Neither objection has any merit.

1. Effect of Bowen v. Roy

The first possible objection to the application of Sherbert and Thomas to this case is the Court's recent holding in Bowen v. Roy, 54 U.S.L.W. 4603 (June 11, 1986). Lawton and the Commission could argue that Hobbie's free exercise claim is analogous to Roy's, and is therefore unprotected. That argument is not supported by the Roy decision.

In Roy, the Court addressed the issue of whether the Free Exercise Clause compels the government to accommodate a religiously-based objection to the statutory

requirements that a Social Security number be provided by an applicant seeking to receive certain welfare benefits and that the states use these numbers in administering the benefit programs. The Court held, in a plurality opinion, that the Free Exercise Clause did not compel the accommodation requested.

In the course of his plurality opinion, and joined on this point by a solid majority of the Court, Chief Justice Burger explicitly reaffirmed and distinguished Roy from Sherbert and Thomas. The opinion points out that the statutes at issue in both those cases provided:

> that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious

> hardship suggests a discriminatory intent. Thus, as was urged in Thomas, to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion. See Brief for Petitioner in 15, and Brief for American Jewish Congress as Amicus Curiae 11, in Thomas v. Review Board, O.T.1979, No. 79-952. See also Sherbert, supra, at 401-402, n.4; United States v. Lee, 455 U.S. at 264, n.3 (Stevens, J., concurring in judgment) (Thomas and Sherbert may be viewed "as a protection against unequal treatment rather than a grant of favored treatment for the members of the religious sect"). In those cases, therefore, it was appropriate to require the State to demonstrate a compelling reason for denying the requested exemption.

54 U.S.L.W. at 4607-08. See id. at 4610 (Blackmun, J., concurring in part) ("I think the question requires nothing more than a straight-forward application of Sherbert, Thomas"); id. at 4614 (O'Connor, J., concurring in part and dissenting in part) ("five members of the Court agree that

Sherbert and Thomas...control the outcome of this case"); id. (White, J., dissenting) (Thomas and Sherbert control).

Here, Florida law created a mechanism for individualized exemptions, providing benefits for claimants who refuse employment for compelling personal reasons. See Appellee's Motion at 13-15. But the Commission deemed a termination resulting from an act based on religious belief acquired during the course of employment to be "misconduct connected with work."

The Commission's refusal to pay benefits was, as in Sherbert and Thomas, a refusal "to extend an exemption to an instance of religious hardship suggest[ing] a discriminatory intent", exhibiting "hostility, not neutrality, toward religion." Roy, 54 U.S.L.W. at 4607-08.

Accordingly, the requested benefits must be provided absent a compelling interest to deny the benefits. As in Thomas and Sherbert, the record is devoid of any evidence supporting such a compelling interest.

2. Change of religious conviction during employment

In its Motion to Dismiss or Affirm, the Commission raised as a significant distinction between this case and Sherbert and Thomas the timing of Hobbie's religious awakening. The Commission pointed out that Florida law, Fla. Stat. §443.101(2), permits payment of benefits to claimants who refuse employment for compelling moral reasons, as well as employees whose employers substantially and unilaterally change a material condition of a job. See Appellee's

Motion at 13-15. Thus, the Commission argued, the plaintiffs in Sherbert and Thomas would have received benefits in Florida.

Hobbie is different, the Commission argued, because, unlike Sherbert, she did not refuse employment as an applicant, and because, unlike Thomas, the employer did not substantially and unilaterally change a material condition of her job. Rather, Hobbie changed her religious convictions during the course of employment, and the unacceptability of her working conditions resulted from a self-initiated change. Therefore, the Commission argued, Hobbie falls outside the rule of Sherbert and Thomas.

The argument that the timing of the birth of religious belief is constitutionally relevant -- that an employee who becomes a Sabbatarian while

employed enjoys less right to unemployment benefits or accommodation than a prospective employee who is a Sabbatarian -- is without basis in logic or law. There is no question here that Hobbie's beliefs are sincere, nor is there any assertion that she adopted these beliefs to gain First Amendment protection for benefits otherwise unavailable. Thus, there is no practical reason to distinguish Hobbie from a Sabbatarian seeking employment. Such a distinction serves solely to penalize severely the fundamental free exercise right to explore and adopt new or different

creeds[2].

While there appears to be no Supreme Court precedent directly addressing the constitutional significance of a change in religious belief, Bowen v. Roy suggests that no constitutional significance exists. The relevance of Roy to the vitality of Sherbert and Thomas is discussed above; of particular significance to this point, however, is that Chief Justice Burger's opinion noted that appellee Roy "had recently developed a

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[2] Human history is replete with examples of people like Hobbie, whose religious awakenings occurred in ways that required significant changes in their employment. For an example of a highly dramatic change in ancient times, see 1 Kings 19:19-21 (Oxford Ann. Bible, Rev. St. Version, 1952). ("So [Elijah] departed from there, and found Elisha, the son of Shapat, who was plowing...Elijah passed him by and cast his mantle upon him. And he left the oxen...")

religious objection to obtaining a Social Security number" for his daughter. Roy, 54 U.S.L.W. at 4604 (emphasis supplied). The timing of the development of the religious belief, though noted, did not give rise to a holding that Roy was not entitled to invoke the Free Exercise Clause, nor did it play any role in the Chief Justice's Free Exercise analysis, or in the opinions of any of the concurring or dissenting Justices.

B. Payment of Unemployment Compensation Benefits to Hobbie Would Not Constitute An Establishment of Religion

In Thomas, the Court addressed the issue of whether paying unemployment compensation benefits to an employee who refused work on free exercise grounds constituted an establishment of religion. The Court held that it did not, as any benefit to religion in such circumstances "manifests no more than the tension between

the two Religion Clauses which the Court resolved in Sherbert...." Thomas, 450 U.S. at 719, quoting Sherbert v. Verner, 374 U.S. 398, 409:

> In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.

Appellee Commission urged in its Motion to Dismiss or Affirm that the Court should overrule Sherbert and Thomas, relying in part on the Court's recent decision in Estate of Thornton v. Caldor, 105 S.Ct. 2914 (1985). Caldor, however, requires no such radical overturn of precedent.

In Caldor, the Court held as an unconstitutional establishment of religion a Connecticut statute that provided employees with the absolute right not to work on their Sabbath. Emphasizing the unqualified nature of the statute's preference of religious concerns over secular interests at the work place, the Court concluded that the "unyielding weighting in favor of Sabbath observers over all other interests...has a primary effect that impermissibly advances a particular religious practice." Caldor, 105 S.Ct. at 2918.

Caldor is distinguishable from this case on at least three grounds. First, in Caldor, the statute provided an absolute and unqualified preference for those who observe the Sabbath (but no other religious practices) over others who, for good secular reasons, might have preferred not to work on

weekends. Here, no such absolute and unqualified preference is requested. If Lawson had proved an inability to accommodate without hardship, or if Hobbie had refused a reasonable accommodation, then Hobbie would not be entitled to unemployment compensation. But here, Hobbie was given the stark choice between working according to an inflexible corporate policy or adhering to her religious conscience.

Second, in Caldor, the requested accommodation of religious practice would have deprived other employees of their rights. In this case, by contrast, there is no record evidence that other employees would, in fact, be harmed. On the contrary, the one employee who would appear to be most affected -- her immediate supervisor, the store manager -- actively participated in an apparently successful accommodation effort.

The requested payment of unemployment benefits does no more than provide for a Sabbatarian precisely the same benefits to which others who cannot work for compelling secular purposes are entitled. Rather than Hobbie's request for payment being a preference for religion, the Commission's reading and application of Florida law is a preference for non-religious beliefs. See Roy, 54 U.S.L.W. at 4611 & n. 17 (Stevens, J., concurring).

Moreover, unlike Caldor, Hobbie's request for benefits based on religious beliefs applies not just to Sabbath observance. Rather, Hobbie's request will ensure availability of unemployment benefits to those professing all forms of religious practices (e.g. religious objections to weaponry production, as in Thomas).

Finally, even if the Court's decision in Caldor did mark a change in First Amendment doctrine extreme enough to require a re-examination of the Court's holdings in Sherbert and Thomas -- a view unsupported by the Court's reaffirmation of those cases in Roy -- this is not the appropriate case for such a weighty task. The record in this case provides a wholly inadequate vehicle for searching constitutional analysis, reversal of well-established precedent and profound change in the Court's current jurisprudence of the Religion Clauses.

To begin with, the only opinion in the record below was written by a Referee of Florida's Unemployment Compensation Appeals Bureau; the Commission affirmed his decision without opinion, as did Florida's District Court of Appeal. Thus, the Court must act

without the benefit of a lower court opinion by any state or federal judge. The opinion not only fails to cite a single case either of Florida or federal law in its conclusions of law, but is also woefully deficient in providing a factual record on which the Court could base a significant constitutional decision.

Several key findings, which could provide a non-constitutional, state law basis to dispose of this case, have not been rendered. For example, the Referee made no finding as to whether the employer, Lawson, made any effort whatsoever to accommodate Hobbie. Nor did the Referee find that the shift-swapping accommodation that Hobbie arranged unilaterally with her colleague would or would not cause her employer <u>any</u> hardship, let alone undue hardship.

Even under the relatively strict standards of Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), Lawson owed Hobbie some effort to accommodate if it could do so without undue hardship. To hold otherwise would provide employers with sole discretion to determine whether to accommodate, without any review by any impartial state or federal tribunal. This would result in totally eviscerating the protections of Title VII, 42 U.S.C. §2000 et seq. and state cognates, and leaving Sherbert and Thomas as mere empty shells. If those facts could be proved -- and on these points the record is silent -- then there might well be no need to reach

any constitutional issues[3].

The record in this case is deficient enough that the Court could well decide not to reach the merits, see Int'l Brotherhood of Teamsters v. Denver Milk Producers, 334 U.S. 809 (1941). At a minimum, the record is sufficiently incomplete as to give the

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[3] The opinion states in its conclusions of law that the "employer's testimony has established that [Hobbie's unilateral shift-swapping accommodation effort] could not be guaranteed as being of a permanent nature and that it would not interfere with the rights of the other employees in the store." Appendix 3a (emphasis supplied). Such a finding, while unclear, suggests that the employer made no effort to assist Hobbie in reaching a mutually satisfactory accommodation, contrary to Hardison's requirement.

Moreover, the notion that a proposed accommodation must be of a nature that it can guarantee, before implementation, no costs or hardships to an employer goes far beyond the requirements of Hardison. And in Hardison, the Court found undue hardship based upon a record which fully explored all of the proposed accommodations and their costs to TWA.

Court serious pause before making it a vehicle for a reconsideration of precedent. See Reserve Army v. Municipal Court, 331 U.S. 549 (1947) (Court follows policy of "strict necessity" in disposition of constitutional issues); see also Bowen v. Roy, 54 U.S.L.W. 4603, 4611-12 & n.18 (Stevens, J., concurring).

CONCLUSION

For the reasons indicated above, amici respectfully urge that the judgment below be reversed.

Respectfully submitted,

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July 3, 1986

No. 85-993

IN THE

Supreme Court of the United States

October Term, 1985

PAULA A. HOBBIE,

Appellant,

v.

UNEMPLOYMENT APPEALS COMMISSION AND LAWTON AND COMPANY,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

BRIEF OF THE RUTHERFORD INSTITUTE, AND THE RUTHERFORD INSTITUTES OF ALABAMA, CONNECTICUT, DELAWARE, GEORGIA, KENTUCKY, MICHIGAN, MINNESOTA, MONTANA, PENNSYLVANIA, TENNESSEE, TEXAS, AND VIRGINIA, AMICI CURIAE, IN SUPPORT OF THE APPELLANT

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INTEREST OF AMICI CURIAE[1]

This case presents important issues concerning the rights of religious persons who are recipients of government benefits. This Court has long recognized the principle that general welfare benefits must be dispensed without the imposition of special burdens on the free exercise rights of the recipients thereof, particularly when there are less restrictive means to accomplish the governmental interest in the efficiency or administrative convenience of its welfare system. The Rutherford Institute believes that the decision of the District Court of Appeal was incorrect and should be reversed.

[1]Counsel of record to the parties in this case described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrew's University. The Rutherford Institute is composed of attorneys, judges, physicians, law students, educators and other citizens dedicated to the protection of religious liberty and other constitutional guarantees. With state chapters in Alabama, Connecticut, Delaware, Georgia, Kentucky, Michigan, Minnesota, Montana, Pennsylvania, Tennessee, Texas and Virginia, and its national office in Manassas, Virginia, the Rutherford Institute has undertaken to assist litigants and participate in significant cases relating to First Amendment religious freedoms. The Rutherford Institute seeks to promote, assure and enhance the freedom of religious persons in the proper exercise of their faith in conformity with the protection afforded by the United States Constitution.

Because of its acute sensitivity to violations of the freedom of religion, the Rutherford Institute has increasingly become one of the nation's most effective and responsible commentators in this important field. Moreover, counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

Statement Of Facts

Amici Curiae adopt by reference the statement of facts as set forth in Appellant's brief filed with this Court.

Summary Of Argument

The only question presented in this case is whether Mrs. Hobbie's Sabbatarianism, which caused her dismissal from employment, disqualifies her from receiving state unemployment benefits solely because her religious convictions were newfound. The State of Florida invites this Court to relax the protection afforded by the Free Exercise Clause under such circumstances, but this invitation should be categorically rejected as inconsistent with the spirit and intent of this Court's free exercise decisions in

Sherbert v. Verner, 374 U.S. 398 (1963), *Thomas v. Review Board,* 450 U.S. 707 (1981) and *Bowen v. Roy,* ____ U.S. ____, slip op. (June 11, 1986).

The State of Florida's denial of benefits to Mrs. Hobbie on grounds of "misconduct" arising from her sincerely held religious beliefs has impermissibly burdened the practice of her religion. The State's unemployment compensation scheme is unduly burdensome on two points. First, it imposes a state badge of "misconduct" on the practice of her sincerely held religious beliefs. Second, it imposes a penalty on the exercise of such beliefs by denying benefits otherwise available. This pressure upon Appellant to modify her behavior or to violate her beliefs is at war with her rights under the Free Exercise Clause. Moreover, applied in the context of one who has changed her religious beliefs and practices, the state policy demonstrates an animus against anyone who would change his or her belief structure. This official hostility to religious liberties, in general, and religious conversion, in particular, cannot be permitted to stand.

Appellees attempt to distinguish this case from *Sherbert* and *Thomas* on grounds that it was Appellant who caused the unemployment by asserting newfound religious practices. It is further argued that, in the earlier cases, it was the employer who caused the conflict which led to the unemployment. This distinction is illusory. It ignores the fact that the burden on religious beliefs and practices is the same in either instance. Moreover, the essential constitutional question in free exercise cases has always been the sincerity of religious beliefs and practices, not the timing of the acquisition and assertion of religious practices. *West Virginia v. Barnette,* 319 U.S. 624 (1943); *United States v. Seeger,* 380 U.S. 163 (1965); *United States v. Ballard,* 322 U.S. 78 (1944); *Bowen v. Roy,* ____ U.S. ____, slip op. (June 11, 1986); *see also Callahan v. Woods,* 658 F. 2d 679 (9th Cir. 1981), and *Key State Bank v. Adams,* 360 N.W. 2d 909 (Mich. Ct. App. 1984).

This Court's recent decision in *Bowen v. Roy,* ____ U.S. ____, slip op. (June 11, 1986) also supports Appellant's position. There, the Court indicated that when a state

created a mechanism for individualized exemptions, "its refusal to extend an exemption in an instance of religious hardship suggests a discriminatory intent." *Id.* at 14. In this case, Florida's blanket determination that religious practices arising from employee religious conversions is "misconduct" in all cases exhibits impermissible state hostility toward religion.

The State's assertion that the Establishment Clause is a compelling state interest justifying the denial of benefits has previously been rejected in *Sherbert* and *Thomas*. Moreover, under the reasoning of this Court's recent decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lynch v. Donnelly*, ___ U.S. ___, 104 S. Ct. 1355 (1984) and *Witters v. State Commission for the Blind*, ___ U.S. ___, 106 S. Ct. 748 (1986), state provision of unemployment benefits to persons unemployed because of the exercise of their religious beliefs would not violate the classic tripartite test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Finally, in *Bowen v. Roy*, ___ U.S. ___, slip op. at 18 n. 19 (June 11, 1986), this Court clearly stated that an exemption to accommodate religious beliefs would not violate the Establishment Clause.

ARGUMENT

I.

State Denial Of Unemployment Compensation Benefits To An Individual Who Refuses To Act In Violation Of Her Religious Practices Constitutes An Impermissible Burden On Free Exercise.

In an apparent attempt to obfuscate the central question in this case, the State of Florida has painted the issues in very broad strokes. According to its Motion to Dismiss or Affirm, the issues are: (1) whether an employee can "force her employer to change the conditions of her employment to accommodate her new religious convictions" and (2) whether a state must provide "special treatment" to a person who becomes unemployed because of newfound religious convictions. *See Motion to Dismiss or Affirm*, pp. 17-18. The fallacy in this portrayal of the issues is patently evident. First, the dispute is not whether Mrs. Hobbie can force her employer to accept her back to work or can force her employer otherwise to accommodate her religious beliefs and practices; rather, it is whether the State of Florida can lawfully deny unemployment compensation benefits based on alleged employee "misconduct" arising from sincerely held religious convictions.[2] Second, with respect to mandatory "special treatment," the question is not whether states must give "special treatment," but whether the Free Exercise Clause protects against state discrimination imposed against persons who become unemployed because of their religious practices.

The State's portrayal of the issues notwithstanding, the only question presented by this case is whether Mrs. Hobbie's Sabbatarianism, which caused her dismissal from employment, disqualifies her from receiving state unemployment compensation benefits solely because her religious convictions were newfound. The State invites this Court to relax the protection afforded by the Free Exercise Clause on these facts, suggesting a parsing of the record that amounts to nothing more than an over-simplified "who struck John first" analysis. If the employer acted

[2]Even if Mrs. Hobbie's employer did establish lawful policies that discouraged church attendance or otherwise failed to accommodate her religious practices, this does not mean that such policies can be engrafted without consequence onto state law in a manner that effectively interferes with individual free exercise rights. The state and private action dichotomy is basic to constitutional theory. *See e.g. Burton v. Wilmington Parking Authority*, 365 U.S. 714 (1961); *Moose Lodge v. Irvis*, 407 U.S. 163 (1972). It would be mistaken to permit the State to be shielded by a corporation's private discretion. Although even corporate discretion is limited (*see e.g.* 42 U.S.C. 2000a *et seq.*), the State is accorded a far narrower scope in which to justify its actions and, in any event, although a corporation may lawfully impose burdens on an employee's religious activities, the State may not.

Further, the State's assertion that its benefit payments will adversely affect the employer's pecuniary interests is of no constitutional significance. Aside from the fact that the State does not have standing to raise claims on behalf of the employer, this argument must also fail because unemployment compensation benefit *contributions* by

first to violate her religious practices, state benefits would be granted, but if not, state benefits would be denied on the logic that the employee's action precipitated the unemployment. This approach should be categorically rejected as inconsistent with the spirit and intent of this Court's free exercise decisions. The state-imposed "badge" of misconduct and the State's denial of unemployment compensation benefits in this case impermissibly burden Mrs. Hobbie's free exercise of her religion. *Sherbert v. Verner,* 374 U.S. 398 (1963); *Thomas v. Review Board,* 450 U.S. 707 (1981).[3]

(footnote 2 continued)

employers are merely part of Florida's method of raising revenue for welfare purposes. Thus, Florida's decision to tax employers, rather than the public at large, to cover unemployment welfare makes any payment from the public fisc to Mrs. Hobbie no more of a burden to the employer than would a payment to any of its former employees who likewise had a legitimate claim to benefits. Any harm to the employer is at most remote and indirect. *See FLA STAT* Section 443.131(3)(b).

Despite Appellees' protestations to the contrary, the decision in this case must be based on the State's responsibility to compensate Appellant's unemployment, as it would for anyone else who was unemployed for legitimate, even constitutionally protected, reasons.

[3]Appellees try to deemphasize the moral nature of "fault," in the Florida statute, by citing *Slusher v. State Department of Commerce,* 354 So. 2d 450 (Fla. 1st DCA 1970). *See Motion to Dismiss or Affirm* at p. 19. *Slusher,* however, never mentions "fault" at all. Further, Ms Slusher quit her job because she was moving, whereas Mrs. Hobbie was dismissed against her will because she worshipped on Saturdays. The Constitution expressly protects free exercise of religion, but not the option of relocating one's residence.

Appellees also conveniently omit from their Motion to Dismiss or Affirm the statutory definition of "misconduct" contained in *FLA STAT* Section 443.101 (1981):

> "Misconduct" includes, but is not limited to, the following, which shall not be construed in pari materia with each other:
>
> a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of his employee; or

In *Sherbert* and *Thomas,* this Court established a clear rule as to the unconstitutionality of placing conditions, repugnant to an individual's religious beliefs, on the receipt of public benefits.[4] In deciding the validity of state-imposed conditions on the award of benefits, the Court first determined whether the particular statute or state practice burdened the claimant in freely practicing his or her religious convictions. If there was a burden, this Court then ascertained whether the State had demonstrated a compelling interest to justify the infringement. If there was no compelling state interest, the State was required to demonstrate that there was no less restrictive means to

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(footnote 3 continued)

> b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Moreover, the same District Court of Appeal, from which this appeal proceeds, held in *Erber v. Federal Express Corporation,* 409 So. 2d 522 (Fla. 5th DCA 1982) that a substantial degree of moral scienter is necessary for benefits to be withheld. In that case, the Court stated, "Just because [appellant's] actions may have warranted his dismissal from unemployment does not mean he cannot receive unemployment benefits," and "the actions of the appellant do not amount to such willful or wanton disregard, or culpability or evil design, etc. to warrant a disallowance of unemployment benefits." *Id.* at 524. Other more recent cases are to the same effect. *Sears Roebuck and Co. v. Unemployment Compensation Commission,* 463 So. 2d 465 (Fla. 3rd DCA 1985) (sexual advances to coworker); *Hines v. Department of Labor and Employ Sec.,* 454 So. 2d 1104 (Fla. 3rd DCA 1984) (belligerent refusal to work). Despite Appellee's attempt in this court to portray Appellant as a "conspirator" seeking to avoid company policy, the record is clear that Appellant attempted to cooperate and continue working and did not demonstrate an evil or improper motive for her conduct.

[4]This does not mean *Sherbert* was the first case condemning unconstitutional conditions. For a review of earlier cases see *Note, Unconstitutional Conditions,* 73 Harv. L. Rev. 1595, 1599 (1960), which states, "Denying a benefit because of the exercise of a right in effect penalizes that exercise making it tantamount to a crime. Punishing constitutionally protected activities seems clearly a violation of substantive due process."

accomplish its objectives. *Sherbert v. Verner*; 374 U.S. at 403, 407; *Thomas v. Review Board,* 450 U.S. at 717-18.

The claimants in *Sherbert* and *Thomas* were, in effect, required to choose between violating their basic religious principles and working, or obeying their religious principles and not working.[5] To further complicate their choice, if they chose to obey the mandates of their religious beliefs, the states would not award them unemployment compensation benefits *because* of their choice. In both cases, this Court held that withholding benefits under these circumstances impermissibly burdened the individuals' free exercise rights. As this Court said in *Thomas v. Review Board,* 450 U.S. at 717-18:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement is nonetheless substantial.

The Court also determined in *Sherbert* and *Thomas* that any state interest in limiting fraudulent claims was not compelling. Even if it were, there were less restrictive ways of limiting fraud, malingering and deceit. Likewise, absent a showing of administrative inconvenience and no other "strong state interest" that would justify the infringement, the state action in denying benefits was, in both cases, found to be constitutionally unjustified.

The situation in the instant case is more aggravated. Not only was Appellant faced with the choice of either working and violating her religious practices, or continuing Saturday observance of her Sabbath and becoming unemployed and forfeiting unemployment compensation benefits, but she was also faced, in effect, with a state animus against a change in her belief structure—i.e. the stigma of a state-imposed badge of "misconduct" for her actions. She chose to abide by her convictions and suffer the consequences. However, the pressure not to change her beliefs or to modify her behavior, as well as the pressure to violate her beliefs—indirect though it may have been—was substantial, and an infringement of her rights. There is, therefore, absolutely no distinction between *Sherbert, Thomas* and this case, either with respect to the action taken or the burdens imposed by the State, except, perhaps, that in the instant case, Mrs. Hobbie has also borne the opprobrium of a state finding of "fault" and "misconduct" in the exercise of her faith and the consequent loss of her job.[6]

[5]Mrs. Sherbert was discharged because she refused to work on her Sabbath. She was subsequently denied benefits because she refused to accept other available work on her Sabbath. Mr. Thomas was forced to quit work when his employment duties forced him to violate his religious practices. He was denied benefits because the employer alleged he left employment voluntarily.

[6]Although the sincerity of Mrs. Hobbie's beliefs are recognized by both parties (see *Record* at 70), the centrality of the affected practice to her religious beliefs may provide protection beyond that of other specially protected religious activity. As Professor Tribe has posed it:

> Closely related to the question of sincerity is the element of how central or essential to the religion is the practice prohibited by the prohibition or requirement. Clearly a conflict which threatens the very survival of the religion or the core values of a faith poses more serious free exercise problems than does a conflict which merely inconveniences the faithful.

L. Tribe, *American Constitutional Law,* Section 14-11 at 862 (1978).

Thus, this Court did not find it excessively entangling to explore Amish life and culture to discern how their religious beliefs and practices would be burdened by the compulsory education law. *See Wisconsin v. Yoder,* 406 U.S. 205 (1972). The centrality of Appellant's Sabbatarian views is immediately apparent in that her particular denomination found them so fundamental that they derive their name from this doctrine. The fact that Appellant is a "Seventh-day Adventist" shows that this part of her faith is not only a core value, but also goes to her very identity. Further, the emphasis placed on Sabbath worship in Adventist theology may further buttress the notion that this belief is central to their religion. For the view of two leading Adventist authors, consider the following statements.

"In a special sense the Sabbath teaches us to respond in an orderly manner to God on His Holy Day. Such a regular response requires a deliberate interruption of all secular activities. We have just seen that

Appellees distinguish these two cases from the instant case, arguing that Appellant, whose beliefs were acquired after she began employment, caused the unemployment and should, therefore, be ineligible for benefits.[7] The proposed distinction is illusory. First as previously demonstrated, the burden on free exercise rights is the same regardless of when religious convictions are acquired or who initiates the conflict between requirements of employment and conscience. As Judge Arlin Adams concluded in *Callahan v. Woods,* 658 F. 2d 679, 687 (9th Cir. 1981), a case where a father's refusal on religious grounds to obtain a Social Security number for his daughter was upheld against a constitutional challenge, "so long as one's faith is religiously based at the time it is asserted, it should not matter, for constitutional purposes, whether that faith derived from relevation, study, upbringing, gradual evolu-

(footnote 6 continued)

this act of resting to honor God represents in itself a most meaningful *worship* response" (emphasis added). S. Bacchiocchi, *Divine Rest for Human Restlessness,* at 180-81 (1980).

"So far we have seen that the Sabbath is essentially the seventh day on which no work is to be done. Though this is a correct definition of the Sabbath it is undoubtedly too narrow. The Sabbath is much more than just a 'secular' day of freedom and the seventh day without work. It is also a religious day, a festal day, and a day of worship." N. Andreasen, *Rest and Redemption,* at 60 (1970).

[7]Although Appellees assert that the agent of change was Appellant, the record indicates that the change, in this case, came from the employer's management. In the language of the Appeals Referee, "The store manager and the claimant worked out a compromise which allowed him to cover for the claimant on Friday nights and Saturdays, in return for which she would work evenings and Sundays for the manager." *Notice of Decision of Appeals Referee,* at 1. Later, after the employee made this accommodation, the general manager demanded a change in the status quo by ordering that she either begin working on Friday evenings and Saturdays or resign. Thus, the employer's accommodation, which was acceptable to Appellant, was later changed by upper management. Appellant was given the ultimatum by which she was forced to either cease her Saturday worship or lose her job. Therefore, even if the State's fine distinctions about the "agent of change" are indulged in this case, from a technical standpoint, Mrs. Hobbie was *not* the agent of change.

tion, or some source that appears entirely incomprehensible." Likewise, the sincerity of Mrs. Hobbie's decision to honor her Sabbath is the relevant constitutional issue, not the when and how of her exercise of that practice.

It is also fundamentally inconsistent to assert that Sherbert's and Thomas's refusals to violate their religious convictions were for "good cause(s)," but that Appellant's refusal constitutes "misconduct." If there is a distinction, it is that Appellant's situation should receive more protection because her refusal to resign was a clear indicia that she wanted to be employed. The purpose of the Florida Unemployment Compensation Benefits Law is to "benefit ...persons unemployed through no fault of their own." *FLA STAT* Section 443.021. Classifying Appellant's belief that she must worship on Saturday as either a "fault" or "misconduct," both of which under standard dictionary definitions imply moral failings or defects, is contrary to the spirit and substance of this Court's previous decisions and the Free Exercise Clause.

The State's position, if allowed, would effectively coerce uniformity of faith and orthodoxy upon individuals who otherwise would receive benefits while they seek other employment suited to their religious practices. And, as this Court has observed, "[No] official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia v. Barnette,* 319 U.S. 624 (1943).

That timing of the acquisition of religious beliefs is immaterial to the constitutional principles at issue is evident from other decisions of this Court. In *United States v. Seeger,* 380 U.S. at 167-68 (1965), one of the defendants, Jakobson, was convicted for refusing to submit to induction. Jakobson was originally classified under the standard draft classification, but for several years he intermittently enjoyed a student classification. Five years later, he claimed a noncombatant classification, as a conscientious objector. Finally, eight months later he requested a classification as a religiously exempted conscientious objector. He explained that his "religious and social thinking

had developed after much meditation and thought." *Id.* at 167. The Court found that his was a sincere religious belief placing him on common ground with those who had consistently held religious beliefs against war. Thus, this Court was not willing to distinguish Mr. Jakobson's newfound religious objections to war from the longer more stable beliefs of others exempted. There was no expression in *Seeger* about gearing the effect of an exemption to the date the war started or the date an objector became convinced of his beliefs or the date the government ordered him to duty. Time and the facts precipitating belief were largely irrelevant to the essential constitutional inquiry into the sincerity of beliefs. No less should be true for Appellant because of her conversion to Adventism.

In *United States v. Ballard,* 322 U.S. 78 (1944), Justice Jackson commented on religious experiences quoting William James:

> If you ask what these experiences are, they are conversations with the unseen, voices and visions, responses to prayer, *changes of heart,* deliverances from fear, inflowings of help, assurances of support, whenever certain persons set their own internal attitude in certain appropriate ways.

W. James, *Collected Essays and Reviews,* at 427-28, as quoted in *United States v. Ballard,* 322 U.S. 78, 93 (1944, Jackson, J., dissenting). The right of the free exercise of religion would have little substance if the right to change one's views resulted in adverse state action solely because of that change. Concepts of inquiry and growth are inherent in the very definition of religion. Both modern and traditional views of religion often express the necessity of a series of religious developments in the life of the believer. Conversion to a belief is an inescapable aspect of many religious experiences. Change may, in fact, be the norm, not the exception.

A recent Michigan Court of Appeals decision decided on substantially identical facts as the instant case is also instructive. In that case, a claimant became an Adventist after the commencement of her employment, and was dismissed for refusing to work on Saturday. *Key State Bank v. Adams,* 360 N.W. 2d 909 (Mich. Ct. App. 1984). The employer argued that the claimant was not entitled to unemployment benefits because "she chose, after beginning employment, to acquire religious beliefs which conflicted with the requirements of her job." *Id.* at 911. The Court of Appeals responded by stating that the determination of "whether the claimant can be viewed as being at fault is a determination which must be made in light of the First Amendment, not the language of the state statute." *Id.* at 912. The court further stated, "We do not accept the view that the First Amendment protects the right to adhere to religious beliefs, but not the right to adopt such beliefs in the first instance or convert from one faith to another." *Id.* at 913. The court ruled that the benefits should be awarded to the claimant, refusing to place her in an inferior category merely because she converted after her employment began.

This Court's recent decision in *Bowen v. Roy,* ____ U.S. ____, slip op. at 14 (June 11, 1986) also supports Appellant's position. Reaffirming *Sherbert* and *Thomas,* this Court observed:

> The statutory conditions at issue in those cases [*Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, "without good cause," he had quit work or refused available work. The "good cause" standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent. Thus as was urged in *Thomas,* to consider a religiously motivated resignation to be "without good cause" tends to exhibit hostility, not neutrality, towards religion.[8]

[8] "Indeed, five members of the Court agree that *Sherbert* and *Thomas,* in which the Government was required to accommodate sincere religious beliefs, control the outcome of this case...." *Bowen v. Roy,* ____ U.S. ____, slip op. (O'Connor, J., concurring).

Applying this analysis in the instant case, the Florida statute's procedure for determining "misconduct" establishes a mechanism for individualized exemptions. Moreover, the "misconduct" standard is more negatively value laden than is "good cause." The former intimates wrongful activity or improper behavior, whereas the latter connotes misdirection or mistaken reasoning. Therefore, if a religiously motivated unwillingness to work is without "good cause," and impermissibly exhibits hostility toward religion, then labelling Sabbatarianism as "misconduct," *a fortiorari,* exhibits hostility toward religion. Since the State of Florida has clearly defined "misconduct" with a distinct moral pejorative, the classification of Mrs. Hobbie's exercise of her faith as "misconduct" constitutes impermissible state hostility and discrimination.

If the Free Exercise Clause means anything, it prohibits at the very least governmental action which, in effect, brands religious conversion as a "fault" or "misconduct" and denies otherwise available monetary benefits to a person who loses his or her job because of beliefs or practices arising from a religious conversion. To hold otherwise would relegate the Free Exercise Clause to the dungheap of constitutional jurisprudence.

II.

The Establishment Clause Does Not Provide, On The Facts Of This Case, A Compelling State Interest To Justify The Burden Imposed Upon Appellant's Free Exercise Rights.

The burden imposed on Appellant's religious practices being the same in this case as in *Sherbert* and *Thomas,* it remains to inquire whether the State has demonstrated a compelling state interest to justify the infringement and, if so, whether there is a less restrictive means to accomplish the state objective.

The State asserts that Appellant demands "a rule of law providing more favorable treatment of persons who become unemployed for religious reasons than it provides

for those who become unemployed for equally compelling secular reasons." *See Motion to Dismiss or Affirm,* pp. 20-21. Such a rule, Appellees contend, would violate the Establishment Clause. Appellees rely on *Estate of Thornton v. Caldor,* ____ U.S. ____, slip op. (June 26, 1985), to support their position. *Thornton,* however, is not on point. That case involved state action that required employers generally to make affirmative religious accommodation to their employees. There is no such state-prescribed religious practice or institution imposed on employers in this case. Here, as in *Sherbert,* "the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences and does not represent that involvement of religion with secular institutions which it is the objective of the Establishment Clause to forestall." *Sherbert* 374 U.S. at 407.

Appellees also cite *Everson v. Board of Education,* 330 U.S. 1 (1947) (see *Motion to Dismiss or Affirm,* p. 22), yet this Court, in *Everson,* observed "[a state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." *Id.* at 16. If the lower court decision is not reversed, Florida will have done what *Everson* said was proscribed.

In *Thomas v. Review Board,* 450 U.S. 707 (1981), this Court acknowledged, "[T]here is, in a sense, a 'benefit' to Thomas deriving from his religious beliefs, but this manifests no more than the tension between the two religion clauses." Any benefit in such cases is, however, merely incidental to the secular purpose and effect of "insuring employment opportunities to all groups in our pluralistic society." *Thornton,* ____ U.S. ____, slip op. (June 25, 1985) (O'Connor, J., concurring).

The State's argument that denial of unemployment benefits is compelled by the Establishment Clause is further discredited by this Court's holding in *Widmar v. Vincent,* 454 U.S. 263 (1981) and *Lynch v. Donnelly,* ____ U.S. ____,

104 S. Ct. 1355 (1984) and *Witters v. State Commission for the Blind,* ____ U.S. ____, 106 S. Ct. 748 (1986). In *Widmar,* this Court found that Establishment Clause obligations did not compel state discrimination against students who desired to use public facilities for religious speech. In *Lynch,* the Court determined that the display of a creche in a public park did not violate the Establishment Clause. And, in *Witters,* an award of vocational benefits was permitted to a blind student studying for the ministry, despite Establishment Clause concerns. In determining whether the state action in these cases violated or was compelled by the Establishment Clause, this Court applied the classic tripartite test. *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

Applying this test, it is clear that the Florida Unemployment Compensation Benefits Law has the secular purpose of providing stopgap income during transition from one job to another. Moreover, the law's incidental benefit to Mrs. Hobbie in her observance of her Sabbath clearly does not advance religion. There is no empirical evidence that unemployment compensation would be awarded primarily to Seventh-day Adventists or to other Sabbatarians, or that it would substantially advance that practice. Benefits accrue to all eligible unemployed persons, religious and nonreligious. There is no "imprimatur" of state approval of religion, only a recognition of the values mandated by the Free Exercise Clause. The primary effect of the program cannot, therefore, be considered as other than purely secular in nature. Finally, there is no entanglement problem because the State must only make the factual determination of whether the claimant is sincere.

Because of the pervasive nature of modern state benefits, to argue against Mrs. Hobbie's right to receive benefits would be tantamount to sanitizing public life from any and all religious influence. "[No] institution within [society] can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government." *Lynch v. Donnelly,* ____ U.S. ____, 104 S. Ct. 1355 at 1359 (quoting *Zorach v. Clauson,* 343 U.S. 306 at 314, 315 (1952)). The State of Florida must be pre-

disposed not merely to tolerate, but to accommodate Mrs. Hobbie's religious practices, particularly when the State's failure to make available otherwise generally available benefits impermissibly burdens the exercise of her faith.

Finally, in *Bowen v. Roy,* ____ U.S. ____, slip op. at n. 19 (June 11, 1986), this Court clearly stated that an exemption to accommodate religious beliefs would not violate the Establishment Clause. There is therefore no reason that an exemption to accommodate religious beliefs in this case would violate the Establishment Clause.

CONCLUSION

The Framers of the Constitution were all too aware of the consequences of governmentally prescribed religious orthodoxy. Protecting the rights of those whose religious values seemed unusual or out of the ordinary was a primary concern to the near descendants of the State Church of England's dissenters.

The protection, however, goes deeper than safeguarding the beliefs of particular sects. It must reach to the individual liberties retained by the governed to order their lives in accordance with their values and principles. If people are in effect deprived of their right to observe their faith by undue governmental influence, the Constitution becomes a document of only historical interest, devoid of any real power to protect the people.

In this case, the State's denial of benefits casts too broad a shadow over protected liberty. The Court must, for this reason, reject the State's attempt to unfairly burden the claimant's religious practices and reverse the District Court of Appeal decision.

Respectfully submitted,

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